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Subject Digest

Action Appealable

Review Board affirms ALJ ruling denying petition to intervene in broadcast renewal and assignment proceeding. Petitioners attempt to regain control over licensee corporation from the trustee in bankruptcy was a subject more appropriate for the court which has primary jurisdiction over the receivership. Moreover, petitioners claim that he had evidence to offer adverse to the party-applicants was not sufficient to warrant full party status since Rule 1.225 allows non parties to give relevant evidence.
—*Daniel Meister*
MM Docket No. 83-955

Administrative Finality

Proceeding remanded to assess the impact of relocation of operational transmitter towers on pending proposals. Relocation may have the effect of eliminating existing night time white and gray areas. This constitutes a change in core circumstances of decisionally significant facts requiring further proceedings and takes precedence over need for administrative finality.
—*Golden State Broadcasting Corp.*
BC Docket No. 79-56

Air Hazard Issues

Review Board affirms ALJ's Summary Decision denying application on air hazard issue for lack of FAA clearance or request for restudy.
—*Neil I. Sanders*
MM Docket No. 84-1004

Allocation, Frequency

Public safety terrestrial fixed service operator facing frequency relocation to accommodate Direct Broadcast Satellite (DBS) operations petitions for special relief in the form of mandatory reimbursement from DBS permittees or an extension of the date by which it must operate on a strict non-interference basis with DBS operators. Extension granted due to the critical nature of the public safety services at stake and the threat to those operations that a more timely relocation would present.
—*County of Los Angeles*

Terrestrial fixed service operator facing frequency relocation to accommodate Direct Broadcast Satellite (DBS) operations petitions for an extension of the date by which it must operate on a strict non-interference basis with DBS operators. Relief denied, as determination had been previously made that the public interest favored introduction of the DBS services, despite costs of relocation for existing users of the frequencies, and no change in circumstances warranting reevaluation of that determination was presented.
—*County of Los Angeles*

AM-FM Relationship

Former requirement, in Section 73.37(e)(1) and (e)(2), to take FM service or availability of FM channel into account in determining whether an application for a new AM station or for a major change is acceptable for filing removed. Non-technical acceptance criteria for applications for new AM stations or major changes deleted and special provisions for minority and public radio applicants in the use of U.S. Class I-A Clear Channels removed.

—*Amendment of Part 73*

MM Docket No. 85-39

AM Station Assignment Standards

(See: AM-FM Relationship-*Amendment of Part 73*)

Appeal

Review Board affirmed ALJ's dismissal of application for failure to prosecute. Applicant repeatedly failed to comply with procedural deadlines.

—*Hillebrand B/cing, Inc.*

MM Docket No. 85-13

Appeal, Denied

Review Board denied appeal from ALJ's order dismissing application from comparative hearing for failure to prosecute. Applicant had not supplied information required by Hearing Designation Order nor responded to motions to dismiss and to enlarge issues directed against it and did not attend prehearing conference. It may not shift responsibility for non-prosecution to former counsel.

—*Vela Broadcasting Co.*

MM Docket No. 85-132

Appeal, Procedural Requirements

Review Board reinstated application that was dismissed by ALJ for failure to publish notice of the designation of the application for hearing. Board also indicated that appellant erroneously invoked Section 1.302 in prosecuting its appeal and that Section 1.301 was the proper vehicle since the dismissal of appellant's application did not terminate the proceeding.

—*Coast TV*

MM Docket No. 84-934

Application, Amendment of, Failure to File

Review Board affirms ALJ's grant of television construction permit to applicant in five party comparative hearing. One of losing applicants was given a slight to moderate diversification preference but that preference was outweighed by the winner's substantial integration preference. A character issue was also resolved in winning applicant's favor and a motion for additional issues (reporting, financial and ineptness) denied.

—*Omaha TV, Inc.*

BC Docket No. 80-691

Application, Dismissal With Prejudice
(See: Appeal, Procedural Requirements—*Coast TV*)

(See also: Appeal—*Hillebrand B/cing, Inc.*)

(See also: Appeal, Denied—*Vela Broadcasting Co.*)

Application, for Review
Commission denied several applications for review of its Block of Time Order. The applications for review sought reversal of the Bureau's June 6, 1984 order, and requested that the Block of Time plan be declared unlawful and removed from AT&T's tariff. Commission denied applications for review because provisions of Block of Time Order would benefit the public.
—*AT&T Co.*

Application, Not Acceptable for Filing
(See: AM-FM Relationship—*Amendment of Part 73*)

Auxiliary Service
Frequency authorization procedures revised to allow for new technologies and reduced bandwidth equipment. Also, emission standards revised to permit spectrum efficient single sideband technology to be licensed and implemented in the aural STL/ICR band without further Commission rule making.
—*Technical/Operational Requirements*
MM Docket No. 85-36

Bankruptcy
(See: Action Appealable—*Daniel Meister*)

Auxiliary Service
Frequency authorization procedures revised to allow for new technologies and reduced bandwidth equipment. Also, emission standards revised to permit spectrum efficient single sideband technology to be licensed and implemented in the aural STL/ICR band without further Commission rule making.
—*Technical/Operational Requirements*
MM Docket No. 85-36

Bankruptcy
(See: Action Appealable—*Daniel Meister*)

Business Radio Service, Eligibility
Memorandum Opinion and Order adopted affirming Private Radio Bureau's cancellation of 800 MHz trunked channels for failure to meet loading requirements of Rule 90.366(e).
—*Business Radio Communications, Inc.*

Business Radio Service, Frequency
(See: Business Radio Service, Eligibility—*Business Radio Communications, Inc.*)

Candor

A showing that an applicant's antenna site proposal is infeasible does not by itself constitute a *prima facie* showing warranting the addition of a misrepresentation/candor issue under Section 1.229 absent the allegation of specific facts demonstrating an intent to deceive.

—*Gary D. Terrell*

MM Docket No. 84-961

CATV EEO Policy

Commission instituted new rules and requirements for cable entities regarding equal employment opportunities (EEO) based on EEO policy reflected in Cable Communications Policy Act of 1984 (Cable Act). These rules set forth policies and practices to ensure nondiscrimination in employment in the cable industry. Further, Commission adopted filing requirements for purpose of certifying and investigating EEO compliance as required by the Cable Act.

—*Amendment of Part 76*

MM Docket No. 85-61

CATV, Equal Employment Requirements

(See: CATV, EEO Policy—*Amendment of Part 76*)

Character Qualifications

(See: Application, Amendment of, Failure of File—*Omaha TV, Inc.*)

Circumstances, Change in, Substantial or Significant

(See: Administrative Finality—*Golden State Broadcasting Corp.*)

Common Carrier

Commission adopted Order that removes structural separation requirements for AT&T's provision of CPE, although not for AT&T's enhanced services operations. The structural separations requirements are replaced with certain nonstructural safeguards.

—*AT&T Co.*

CC Docket No. 85-26

Common Carrier, Accounting System

Report and Order adopted incorporating generally accepted accounting principles into the Uniform System of Accounts being developed in CC Docket No. 78-196.

—*Uniform System of Accounts*

CC Docket No. 84-469

Common Carrier, International

Report and Order establishes competitive carrier policies for international telecommunications common carriers. Commission establishes two primary product markets (IMTS and Non-IMTS) and finds that each foreign jurisdiction is a separate product market. Commission finds AT&T and off-shore telephone companies to be dominant for IMTS. Commission finds no carrier dominant for non-IMTS. Comsat

found to be dominant for space segment, multi-purpose and television services.
—*International Carrier Policies*
CC Docket No. 85-107

Common Carrier, Computer II
Commission granted MCI's petition and rejected AT&T's tariff revisions under Transmittal No. 173. Commission also ordered that the purpose of revising proposed tariff language to remove references to Call Prompter service, Sections 61.58 and 61.59 of Rules, 47 C.F.R. Sections 61.58, 61.59, are waived and Special Premission No. 84-798 assigned. Commission found that Call Prompter service could encompass provision of enhanced services within meaning of Computer II decisions, and that its offering under tariff would violate Commission's Rules.
—*AT&T Communications*

Proceeding initiated to determine whether to relieve AT&T from Computer II requirement that it provide customer premises equipment only through subsidiary structurally separated from common carrier operations, and if so, what non-structural safeguards should apply. In addition, requested waiver of Computer II rules granted to permit affiliates within AT&T to share use of proprietary software; waiver requested to facilitate provision of customer premises equipment to federal government found to be unnecessary.
—*AT&T Co.*
CC Docket No. 85-26

Common Carrier, Rate Structure, Inquiry
Petitions for further reconsideration considered and denied.
—*MTS/WATS Market Structure*
CC Docket No. 78-72, Phase I

Competition
(See: Common Carrier, International—*International Carrier Policies*)

Contract Filing With FCC
This Rulemaking proposes to streamline FCC rules pertaining to the filing of contracts by eliminating routine filing of contracts by non-dominant carriers treated with forbearance and also proposes to eliminate routine filing of certain reports.
—*Amendment of Part 43*
CC Docket No. 85-346

Cross Interest
Application for modification of TV construction permit granted where 90% limited partner of permittee is also owner of daily newspaper in nearby community. Although limited partner could exercise considerable influence in order to protect its investment, specific circumstances of case warrant exception to cross-interest policy.
—*Wisconsin Television, Ltd.*

Customer Premises Equipment
(See: Common Carrier, Computer II—*AT&T CO.*)

(See also: Common Carrier—*AT&T Co.*)

Discrimination, Affirmative Action Program
(See: CATV, EEO Policy—*Amendment of Part 76*)

Diversification, of Control of Mass Media
(See: Application, Amendment of, Failure to File—*Omaha TV, Inc.*)

Emergency Broadcast System
Commission granted waiver of Section 73.961(d) of the rules to allow the broadcasters in San Diego/Imperial Counties Emergency Broadcast System (EBS) Operational Area to optionally use an alternate text when conducting their weekly EBS test.
—*EBS Weekly Test Script Waiver*

Emission Standards
(See: Auxiliary Service—*Technical/Operational Requirements*)

Employment Discrimination
(See: CATV, EEO Policy—*Amendment of Part 76*)

Equipment Authorization Program
Regulations in Part 18 set forth technical standards to control interference from ultrasonic equipment, other than those types used for communication purposes. Medical equipment, in general, has already been granted an exemption from radio noise standards in Part 15 of the Rules.
—*Ultrasonic Equipment*
Gen Docket No. 85-303

Equipment Industrial, Scientific and Medical
(See: Equipment Authorization Program—*Ultrasonic Equipment*)

Failure to Prosecute
(See: Appeal—*Hillebrand B/cing, Inc.*)

(See also: Appeal, Denied—*Vela Broadcasting Co.*)

Foreign Communications
(See: Contract Filing With FCC—*Amendment of Part 43*)

Foreign Country Transmission to
Revisions made in the requirements of Section 73.702(f) of the rules regarding operation of international broadcast stations in ITU Region 3 in the 7100-7300 kHz band.
—*Amendment of Part 73*
MM Docket No. 84-706

Frequency Allocation

Commission denied petitions for reconsideration of the *Allocation Order*, FCC 85-293 (released June 12, 1985); reaffirmed its prior conclusion that letters of agency are essential to the resolution of disputes regarding customer selection of a long distance carrier; and permitted a number of local exchange carriers to use a variety of dispute resolution procedures.
—*Access/Divestiture Tariffs*
CC Docket No. 83-1145

(See also: Auxiliary Service—*Technical/Operational Requirements*)

Frequency, Efficient Use of

(See: Business Radio Service, Eligibility—*Business Radio Communications, Inc.*)

Government Land, Broadcasting Facilities on

Review Board remands comparative TV proceeding to ALJ on site availability issue against winner below. The legal standard of reasonable assurance of site availability is based on site negotiation and applies equally to government-owned and privately-owned land. At a minimum, there must be a meeting of the minds as to the key lease terms upon which the land will be made available.
—*Alden Communications Corp.*
MM Docket No. 83-720

Gray Areas

(See: Administrative Finality—*Golden State Broadcasting Corp.*)

Interlocutory Ruling Appeal From

(See: Appeal, Procedural Requirements—*Coast TV*)

International Agreements and Treaties

(See: Contract Filing With FCC—*Amendment of Part 43*)

International Broadcast Station

(See: Foreign Country, Transmission to—*Amendment of Part 73*)

International Broadcasting

(See: Foreign Country, Transmission to—*Amendment of Part 73*)

Intervention, Request for Denied

Review Board affirms ALJ's ruling denying petition for intervention. Petitioner's untimely request for intervention was designed to protect its private interests rather than to assist the Commission in the determination of the issues.
—*Satellite Relay, Inc.*
CC Docket No. 85-35

(See also: Action, Appealable—*Daniel Meister*)

Issue, Deletion of

(See: Candor-*Gary D. Terrell*)

Issue, Enlargement of, Denied
(See: Application, Amendment of, Failure to File—*Omaha TV, Inc.*)

Misrepresentation
(See: Candor—*Gary D. Terrell*)

Misstatement
(See: Candor—*Gary D. Terrell*)

Multiple Ownership
(See: Cross Interest—*Wisconsin Television, Ltd.*)

Newspaper Ownership
(See: Cross Interest—*Wisconsin Television, Ltd.*)

Notice of Commission Action
(See: Emergency Broadcast System—*EBS Weekly Test Script Waiver*)

Notice of Designation Local
(See: Appeal, Procedural Requirements—*Coast TV*)

Ownership and Management, Integration of
Review Board remands comparative TV broadcast proceeding for inquiry into limited partner's role in limited partnership. Such inquiry is necessary for proper evaluation of integration credit to be given when circumstances indicate limited partner may have had power to influence operation.
—*Family Media, Inc.*
MM Docket No. 83-727

(See also: Application, Amendment of, Failure of File—*Omaha TV, Inc.*)

Partnership Agreement
(See: Ownership and Management, Integration of—*Family Media, Inc.*)

Public Safety Radio Service, Operation
(See: Allocation, Frequency—*County of Los Angeles*)

Radio Frequency Device, Authorization
(See: Equipment Authorization Program—*Ultrasonic Equipment*)

Reconsideration, Petition for
Review Board denied petition for reconsideration of *MO&O* which had denied an appeal from a ruling dismissing appellant's application. Appellant essentially sought to reargue facts leading to its dismissal.
—*Hillebrand B/cing, Inc.*
MM Docket No. 85-13

Remand
(See: Government Land, Broadcasting Facilities on—*Alden Communications Corp.*)

(See also: Ownership and Management, Integration of—*Family Media, Inc.*)

(See also: Administrative Finality—*Golden State Broadcasting Corp.*)

Reports, Required to be Filed
(See: Contract Filing With FCC—*Amendment of Part 43*)

(See also: CATV, EEO Policy—*Amendment of Part 76*)

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(See: Common Carrier, Computer II—*AT&T Co.*)

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(See: Government Land, Broadcasting Facilities on—*Alden Communications Corp.*)

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(See: Allocation, Frequency—*County of Los Angeles*)

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(See: Common Carrier, Computer II—*AT&T Communications*)

Tariff, Revision of
(See: Application for Review—*AT&T Co.*)

Technical Requirements
(See: Equipment Authorization Program—*Ultrasonic Equipment*)

Terrestrial Service
(See: Allocation, Frequency—*County of Los Angeles*)

Transmitter, Site Location
(See: Administrative Finality—*Golden State Broadcasting Corp.*)

White Area
(See: Administrative Finality—*Golden State Broadcasting Corp.*)

Frequency Allocation

Commission denied petitions for reconsideration of the *Allocation Order*, FCC 85-293 (released June 12, 1985); reaffirmed its prior conclusion that letters of agency are essential to the resolution of disputes regarding customer selection of a long distance carrier; and permitted a number of local exchange carriers to use a variety of dispute resolution procedures.
—*Access/Divestitute Tariffs*
CC Docket No. 83-1145

FCC 85-598

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Investigation of Access and Divestiture Related Tariffs	CC Docket No. 83-1145 Phase I
Petitions for Reconsideration and Clarification of Allocation Plan Orders	

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1985; Released: November 14, 1985

BY THE COMMISSION

I. BACKGROUND

1. Most of the former Bell Operating Companies (BOCs) elected to implement equal access requirements imposed by the *Modification of Final Judgment* (MFJ)[1] by assigning subscribers who did not designate a primary interexchange carrier to the American Telephone and Telegraph Company (AT&T). In our *Allocation*

[1] United States v. American Telephone and Telegraph, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

Order[2] we concluded that routing all default traffic[3] to AT&T is an unreasonable and discriminatory practice that violates the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We prescribed a uniform allocation plan effective May 31, 1985 in order to remedy that violation. We also ordered the local exchange carriers (LECs) to file revisions to their interstate tariffs to reflect the prescribed allocation plan.

2. The *Allocation Order* provided that any LEC that found itself unable to comply with the allocation plan or that believed that a modified approach could achieve the goals of the Order could file a petition for waiver of the Order. *Id.* at para. 31. On June 27, 1985, the Bell Atlantic telephone companies (Bell Atlantic),[4] the BellSouth Corporation (BellSouth), the NYNEX telephone companies (NYNEX), Pacific Bell (Pacific), the Mountain States Telephone and Telegraph Company (Mountain Bell) and the Pacific Northwest Bells Telephone Company (PNB) filed petitions for waiver of the *Allocation Order.* US Telecom, Inc. (US Telecom), MCI Telecommunications Corporation (MCI), Satellite Business Systems (SBS), and GTE Sprint Communications Corporation (GTE Sprint) subsequently filed petitions for reconsideration of the *Allocation Order.*[5] In an Order released August 20, 1985, the Chief, Common Carrier Bureau, granted in large part the waivers requested by Bell Atlantic, BelloSuth, NYNEX, Pacific, and Mountain Bell.[6] The Bureau also issued a Public Notice on August 28, 1985, clarifying the application of the

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[2] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Memorandum Opinion and Order, FCC 85-293, released June 12, 1985, 50 F.R. 25982 (June 24, 1985) (*Allocation Order*); *reconsideration pending*, 50 F.R. 32308 (Aug. 9, 1985).

[3] Default traffic refers to the interexchange telephone calls of any customer who, by the time equal access is available, has failed to make a selection of an interexchange carrier (IXC). *See Allocation Order* at para. 1 n.3.

[4] The Bell Atlantic companies include the Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies, the Diamond State Telephone Company and the New Jersey Bell Telephone Company.

[5] US Telecom, Inc. Petition for Partial Reconsideration, CC Docket No. 83-1145, Phase I, filed June 28, 1985 (US Telecom Petition); MCI Telecommunications Coreporation Petition for Reconsideration, CC Docket No. 83-1145, Phase I, filed July 24, 1985 (MCI Petition); Satellite Business Systems Petition for Reconsideration, CC Docket No. 83-1145, Phase I, filed July 24, 1985 (SBS Petition); GTE Sprint Communications Corporation Petition for Partial Reconsideration, CC Docket No. 83-1145, Phase I, filed July 25, 1985 (GTE Sprint Petition).

[6] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Allocation Plan Waivers and Tariffs, Mimeo NO. 6524, released Aug. 20, 1985, 50 F.R. 38200 (Sept. 20, 1985) (*Waiver Order*).

Waiver Order.[7] Five petitions for reconsideration, waiver, or clarification of the *Waiver Order* and the Public Notice have been filed.[8]

3. The questions raised in the petitions for reconsideration, waiver, or clarification of the Bureau's *Waiver Order* are closely related to the questions raised in the petitions for reconsideration of our *Allocation Order.* Therefore, we have decided that all of these petitions should be considered together. This Order will address those petitions.

II. THE WAIVER ORDER PETITIONS

A. Grant of the Waiver Petitions

4. The waiver petitions proposed modifications in a number of the procedures prescribed in the *Allocation Order*, including those concerning the placement of IXCs on the ballot, the treatment of multi-line accounts, the processing of IXC-submitted lists, reduction in the period allowed for return of the ballot, and the disposition of discrepancies regarding a customer's choice of an IXC. It is the Bureau's treatment of requests to use modified approaches in resolving customer choice discrepancies which has generated the most concern on the part of petitioners.

5. The allocation plan prescribed by this Commission required that when both a ballot and an IXC order are received for one customer, and the designated primary IXC does not match on both documents, the ballot takes precedence and the LEC must process the choice shown on the ballot. *Allocation Order*, App. B at para. 23. Bell Atlantic, Pacific, Mountain Bell and NYNEX requested waivers to permit implementation of modified approaches in the disposition of such cases. *See Waiver Order* at paras. 15–20. Bell Atlantic proposed to continue its existing

[7] Clarification of Scope of Allocation Plan Waivers, Public Notice No. 6745, released Aug. 28, 1985 (Notice).

[8] Petition for Clarification of Pacific Bell, CC Docket No. 83–1145, Phase I, filed Aug. 30, 1985 (Pacific Petition); Southwestern Bell Telephone Company Petition for Waiver or, in the Alternative, Petition for Extension of Time for Compliance, CC Docket No. 83–1145, Phase I, filed Aug. 30, 1985 (Southwestern Petition); Petition of the Ameritech Companies for Further Clarification of, or For Relief From, the Common Carrier Bureau's Presubscription Conflict Guidelines of August 20, 1985, CC Docket No. 83–1145, Phase I, filed Sept. 13, 1985 (Ameritech Petition); BellSouth Corporation Petition for Reconsideration or, in the Alternative, Petition for Partial Waiver, CC Docket No. 83–1145, Phase I, filed Sept. 19, 1985 (BellSouth Petition); Satellite Business Systems Petition for Reconsideration, CC Docket No. 83–1145, Phase I, filed Oct. 21, 1985.

practice whereby IXCs indicate on their orders whether a presubscribed customer has been informed of the charge to change IXCs and has agreed to the charge. Bell Atlantic processes such annotated orders and charges the customer for the change. NYNEX sought to give equal weight to all presubscription orders and to resolve conflicts on the basis of authorization dates, processing the order with the latest date. Pacific also proposed to process the order with the latest date; when two IXC orders showed the same date, Pacific proposed that the list processed first would take precedence. Mountain Bell requested permission to contact the customer directly to resolve the dispute.

6. The Bureau, in its analysis of these petitions to permit varied approaches to dispute resolution, noted that the concept of authorization date was central to three of the requests. *Waiver Order* at para. 21. The Bureau recognized that several parties had raised objections to reliance on authorization dates to resolve disputes because of the possibility that dates could be manipulated, but concluded that the letter of agency (LOA) requirement offered protection against potential abuses. The Bureau stated that "the potential for error or abuse [in processing customer orders] is diminished when an IXC obtains letters of agency. Such documents, together with prompt notification to all affected parties, should facilitate dispute resolution." *Waiver Order* at para. 21. The Bureau also recognized, however, that end users who made verbal commitments to use an interexchange carrier's services might not return signed authorizations promptly. The *Waiver Order* therefore permitted the carriers to institute flexible dispute resolution procedures subject to modified letter of agency guidelines.[9] After release of the *Waiver Order*, the Bureau

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[9] The guidelines provide that

> (1) The IXCs are required to certify at the time they submit end user lists to the LECs that they have on file, or have taken reasonable steps designed to obtain, signed letters of agency or confirmations of choice from the end user. The IXCs are not required to submit letters of agency when submitting their end user lists to the LECs, but should maintain the confirmations or letters on file for use in dispute resolution. IXCs should request written confirmations of choice from their customers no later than the date of submission of their first bill to the customer; (2) When the LEC identifies a conflict between a ballot and an IXC list, or between lists submitted by two or more IXCs, the LEC must notify, within 10 days, all affected IXCs via a conflict report; (3) If, upon receipt of a conflict report, the IXC certifies to the LEC that it has on file a signed letter of agency with a date subsequent to that on the ballot, that IXC becomes the primary IXC for that end user and no change charge is assessed to either the IXC or the end user; and (4) In a conflict, if

received a number of inquiries regarding the applicability of the waivers, and subsequently issued a Public Notice designed to clarify the scope of the *Waiver Order. See* note 6, *supra.*

7. The Notice stated that, while the waivers were particular to the carriers requesting them, other carriers seeking to modify their allocation procedures within the limits granted other LECs could do so by filing revisions to the applicable sections of their tariffs, or, where appropriate, should file with the Commission descriptions of any relevant changes to their operational plans. The Notice also stated that "the guidelines for dispute resolution programs set forth in para. 21 and the change charge provisions defined in para. 41 of the *Waiver Order* are applicable to all LECs and their tariffs must be revised to reflect the requirements established in those paragraphs." Notice, *supra*, at para. 2. This statement has proved a source of considerable confusion and is the focus of the petitions for clarification or waiver referenced above at note 7.

B. Petitions for Clarification of Waiver Order

8. Ameritech, BellSouth and Southwestern request Commission approval for continued use of their existing conflict resolution procedures, which give the ballot priority in the event of conflict. Ameritech reports that it sends a second ballot in all cases of conflict to confirm the end user's final choice and that it also honors all business office contracts initiated by end users who wish to revoke an earlier ballot, or to change a prior order placed with an interexchange carrier. Ameritech Petition at iii. Ameritech is primarily concerned with the third guideline, which requires the LEC to process an IXC-submitted order if the IXC certifies that it has on file a signed letter of agency with a signature date subsequent to that on the ballot. Ameritech interprets the guideline to require it to store the signature date of every ballot or order as it is received, and asserts that such storage would require burdensome revisions in its mechanized systems. Ameritech Petition at 6–7. Ameritech also states, however, that it could comply with the guidelines if they are interpreted to require the "IXC to make the date comparison" rather than to require that dates be stored in the Ameritech companies' systems.

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the IXC is unable two obtain a letter of agency signed by the end user, the ballot controls.

Waiver Order at para. 21.

Ameritech Petition at 5.

9. BellSouth's procedures also give ballots precedence over any order than a subsequent, direct customer contact with the LEC business office. BellSouth gives ballots this priority both prior to end office conversion and for a 180-day period thereafter. When BellSouth receives two or more IXC orders for an end user for whom there is no returned ballot, its business office contacts the customer directly to resolve the conflict. The IXCs involved in conflicts are notified by a weekly mechanized add/disconnect report. BellSouth Petition at 4. Customers are informed on their next regular bill of the IXC recorded as their selection. BellSouth asserts that the guidelines would impose additional administrative burdens on it. The company also objects that the third guideline allows no charge for a change in IXCs and asks that, at a minimum, the language be "clarified so that end users are charged after end office conversion for a mere change in their already designated PIC."[10] BellSouth Petition at 7. BellSouth also is concerned that the fourth guideline "apparently" precludes the LEC from contacting the customer when there is no ballot and when no IXC is able to produce written authorization for an order. *Id.*

10. Southwestern states that its customer choice discrepancy procedures incorporate the requirements set forth in Appendix B, para. 23 of the *Allocation Order*. Southwestern Petition at 4. Southwestern asserts that it has requested no waivers, and that the imposition of new guidelines on all LECs by Public Notice abruptly changed the premises upon which the Commission's requirement of an allocation plan were based and violated due process. Southwestern Petition at 7. Southwestern states that customers can change their choice of IXCs by contacting the business office and that, prior to end office conversion, Southwestern does not charge the customer for such a change.

11. The guidelines set forth in the *Waiver Order* were designed to allow the LECs flexibility in disposing of customer disputes, while ensuring that all parties received timely reports of conflicts. They are properly applicable to the LECs which had requested waivers and to other carriers which chose to adopt similar modifications to their dispute resolution procedures. Their application to petitioners, however, would require revision of allocation plans specifically developed by the petitioners to comport with our *Allocation Order*. Moreover, we have concluded that the

[10] "PIC" is an acronym for "primary interexchange carrier."

procedures used by petitioners (which are summarized in paras. 7–9, *supra*,) represent sufficient mechanism for resolving conflicts, and that the petitioners might be forced to incur unnecessary expenses if they were required to alter these conflict resolution procedures. We will therefore grant the petitions of Ameritech, BellSouth, and Southwestern to continue to give the ballot priority in resolving customer choice discrepancies. These companies are not obligated to incorporate guidelines insofar as they were designed to facilitate alternative approaches to dispute resolution.[11] The Bureau's letter of agency guideline, however, to which none of the petitioners object, is relevant in our resolution of the petitions for reconsideration of the *Allocation Order*, *infra*.

C. Application of the Change Charge

12. Pacific requests clarification of para. 41 of the *Waiver Order* which directs local exchange carriers to file revisions to their allocation tariffs to contain, *inter alia*, a provision which states that "after the conversion date, end users will be charged for any change . . . " Pacific Petition at 1. This provision, as Pacific observes, limits the application of the change charge to those customers who request a change after conversion date and differs from the *Allocation Order*, which provided that change charges could be billed to customers who changed their IXC selection after making an initial choice. *See Allocation Order*, App. B, paras. 10, 22, 27. Pacific seeks an interpretation which would make the change charge applicable to customers who, prior to equal access office conversion, request changes to the initial presubscription choice. Pacific Petition at 2.

13. The Bureau, in the course of considering the various approaches to dispute resolution proposed by the parties, became increasingly aware of the possibility of customer confusion. Several LECs, including Southwestern and the Ameritech companies, had also recognized this potential and had decided that

[11] In granting these petitions, however, we take no position regarding the sufficiency of petitioners' procedures for notifying the IXCs of conflicts. We note that two LECs object to the guideline requiring notification to the IXCs within 10 days. Southwestern Petition at 8; BellSouth Petition at 6. Notification of IXCs is not a new requirement imposed by the Waiver Order. We had previously directed the LECs to notify IXCs of conflicts. *See Allocation Order*, App. B at para. 23. The *Waiver Order* merely added a deadline for the provision of such notice. While we will not impose this deadline on the LECs which have not requested waivers, we remind carriers that all LECs must provide expeditious notice of conflicts to the IXCs. We will leave resolution of any problems concerning conflict notification to our complaint process.

customers who revised their IXC selections prior to end office conversion could do so free of a service charge. The change charge guideline was developed in this context. It obviated the need for the LEC to decide whether a conflict resulted from mistake on the part of the carrier or from the end user's change of mind. The guideline protected the consumer's interest while permitting the companies requesting waivers to proceed with their modified conflict resolution procedures. Pacific requested and received a waiver permitting it to use modified dispute resolution procedures which relied on the customer authorization date, rather than on the ballot. The guidelines set forth by the Bureau are, as discussed above at para. 10, properly applicable to Pacific's implementation of its revised procedures. We therefore deny Pacific's requested clarification. In addition, in light of the reports of consumer confusion which the Commission has received since the release of the *Allocation Order*, we conclude that this guideline should be applied to all LECs. It provides, in effect, a grace period for end users, and appears to impose no great burden on the LECs. End users who change their IXC selection prior to end office conversion should not be charged for such changes.

II. PETITIONS FOR RECONSIDERATION OF THE ALLOCATION ORDER

14. Petitions for reconsideration of the *Allocation Order* focus on three areas of concern: (1) the requirement that IXCs have signed letters of agency from customers before submitting orders to the LEC, (2) the priority assigned to the signed ballot in cases of conflicting orders for service, and (3) the requirements for, and timing of, allocation.

A. Letters of Agency

15. The *Allocation Order* provides that IXCs may submit presubscription orders on behalf of customers only if they are "supported by a statement signed by the customer" (letters of agency or "LOAs") and a certification to that effect from the IXC. *Allocation Order*, App. B, §§ 10, 11. MCI asserts that the signature requirement is disruptive to "established industry practice" whereby carriers accept telephone orders from their customers. MCI Petition at 13.[12] MCI requests that signed LOAs

[12] AT&T made similar claims in a Petition for Clarification of the Allocation Order filed July 12, 1985. AT&T's request to use voice recordings or other forms of electronic signature as a substitute for the LOA was denied by the

not be required if an IXC uses verification procedures that could serve as the "functional equivalent" of signed LOAs. MCI Petition at 15. MCI suggests that such procedures might include the IXC's own records regarding customer contact, follow-up telephone calls by a separate verification organization outside the IXC's sales organization, or a subsequent confirmation letter mailed to the customer. *Id.* MCI also suggests that if the signed LOA requirement is retained, it should also be applied to the LECs when they accept orders from customers. US Telecom requests an amendment of paragraph 10 of Appendix B of the *Allocation Order* to permit the IXC to sign the letter of agency "on behalf of the customer." US Telecom Petition at 4.

16. This Commission's LOA prescription is supported by NYNEX, Pacific, Southwestern, and Teltec Saving Communications Co. (Teltec). NYNEX argues that "[w]ithout a written LOA signed by the customer, the Commission's goals of facilitation of dispute resolution, minimization of customer confusion, and the protection of both the local exchange companies and the interexchange companies from customer misunderstandings, cannot be achieved."[13] Teltec states that it "obtains written orders from its customers and finds this practice to be a matter of sound business, not an obstacle to securing customers."[14] Pacific argues that the LEC "as the party responsible for carrying out the order, needs verification of an order that was not placed directly with it."[15] Pacific also opposes MCI's request that the LECs be required to obtain signed order verification if the signature requirement is retained for the IXCs. *Id.*

17. The Bureau's evaluation of the role of the LOA, discussed above at para. 6, accurately reflects the concerns which led to our establishment of the LOA requirement in the *Allocation Order.* The Bureau's guideline (1) for obtaining LOAs also represents a reasonable accommodation with the IXCs' needs for flexibility in marketing.[16] We conclude that such an approach is preferable to

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Bureau. Waiver Order at para. 9. We concur in the Bureau's evaluation of AT&T's proposal.

[13] NYNEX Telephone Companies Opposition to Petitions for Reconsideration, CC Docket No. 83-1145, Phase I, filed Aug. 26, 1985 at 3 (NYNEX Opposition). *See also* Opposition of Southwestern Bell Telephone Company, CC Docket No. 83-1145, Phase I, filed Aug. 26, 1985 at 5 (Southwestern Opposition).

[14] Teltec Saving Communications Co. Opposition to Petition for Clarification and Petition for Partial Reconsideration, CC Docket No. 83-1145, Phase I, filed July 25, 1985 at 5 (Teltec Opposition).

[15] Opposition of Pacific Bell, CC Docket No. 83-1145, Phase I, filed Aug. 26, 1985 at 2.

[16] *See* note 8, *supra.*

the modifications requested by US Telecom and MCI, and we therefore deny their petitions to permit "other verification procedures" or LOAs signed by the carrier to substitute for letters of agency signed by the end user.[17] We will permit, however, the same latitude regarding the timing of LOAs provided in the Bureau's *Waiver Order*. The IXCs are required to certify at the time they submit end user lists to the LECs that they have on file, or have instituted reasonable steps designed to obtain, signed letters of agency or confirmations of choice from the end user. The IXCs should maintain such signed customer authorizations on file for use in dispute resolution.

B. Priority for Ballots

18. GTE Sprint, SBS, and MCI also request reconsideration of our requirement that the LECs process the choice shown on the ballot when both a ballot and an IXC order are received for one customer, and the designated primary IXC does not match on both documents. *Allocation Order*, App. B at para. 23. GTE Sprint argues that this requirement may deprive a customer of a later, better-informed choice.[18] GTE Sprint requests that we replace the ballot priority with a requirement that the LEC must process the latest indication of customer choice (whether ballot or letter of agency). GTE Sprint Petition at 2. SBS also opposes assigning priority to the ballot, asserting that the best way to determine with certainty the end user's true choice in the case of a conflict is to require the LEC to advise the end user in writing and await subsequent clarification.[19] MCI argues that customers should not be "locked into" selections made on the ballot, asserts that there are a number of "acceptable methods" for resolution of presubscription conflicts, and requests that the Commission modify the Order to permit local exchange companies to apply the method most compatible with their order processing systems and

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[17] We also conclude that MCI has failed to provide any basis for its proposal that LECs also be required to obtain signed order verifications from customers. We therefore deny MCI's request that the LOA requirement be imposed on the LECs as well as the IXCs.

[18] Petition for Partial Reconsideration of GTE Sprint Communications Corporation, CC Docket No. 83-1145, Phase I, filed July 25, 1985 at 3 (GTE Sprint Petition).

[19] Satellite Business Systems Petition for Reconsideration, CC Docket No. 83-1145, Phase I, filed July 24, 1985 at 4 (SBS Petition). SBS reiterates this request in its Petition for Reconsideration of the *Waiver Order*, CC Docket No. 83-1145, Phase I, filed October 23, 1985.

the interests of their customers.[20] MCI also requests modification of the requirement that customers for whom conflicting carrier-submitted orders are received be placed in the allocation "pool." MCI suggests that such conflicts be resolved in favor of the latest customer contract date submitted by a carrier. *Id.*

19. Southwestern opposes the above requests and urges the Commission to retain the rule that the ballot controls in all cases of a conflict between a ballot and a carrier-submitted order.[21] Southwestern argues that customers are free to change their previous selections of IXCs by contacting the LEC business office directly. Southwestern asserts that SBS' proposal that LECs resolve all conflicts through written contact with customers would create serious problems in equal access implementation, and would be confusing to the customer. BellSouth also opposes SBS' proposal to limit the LECs to written contacts in dispute resolution, asserting that a verbal contact can be effected more quickly and at less expense that a written one.[22] Both LECs argue that the LECs have no interest in the end user's choice of IXC, and thus have no incentive to mislead or influence a customer in a verbal contact.

20. GTE Sprint, SBS and MCI imply that consumers cannot change their IXC selection unless ballot priority is eliminated.[23] As Ameritech, BellSouth, and Southwestern observe, however, end users are not "locked into" the choice indicated on the ballot but are free to change their selection of IXC by simply contacting the LEC business office.[24] Ballot priority is designed to protect, rather than to limit, consumer choice during a period of vigorous marketing activity by the interexchange industry. LECs which demonstrated that alternative methods of dispute resolution could provide similar protection for end users were granted permission

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[20] MCI Telecommunications Corporation Petition for Partial Reconsideration, CC Docket No. 83-1145, Phase I, filed July 25, 1985 at ii (MCI Petition).

[21] Southwestern Opposition at 2.

[22] Opposition of the BellSouth Companies to Petitioners for Reconsideration, CC Docket No. 83-1145, Phase I, filed Aug. 26, 1985 at 4 (BellSouth Opposition).

[23] GTE Sprint argues, for example, that "a customer would be 'locked into' the choice made by ballot regardless of whether or not this choice reflected an informed decision or, indeed, regardless of whether or not the choice was the result of error or misunderstanding." GTE Sprint Petition at 3.

[24] Ameritech also provides a second ballot to each end user involved in a conflict. Submission of such a second ballot to end users provides both timely notice of the conflict to the customer and an efficient method by which the customer can notify the business office of any requested change in IXC designation.

to use those methods in the *Waiver Order*. *See* paras. 5 and 6, *supra*.[25] We conclude that the public interest would not be served by prescribing new dispute resolution procedures at this time. We therefore deny these petitions to modify ballot priority for LECs which have not sought waivers. IXCs are free to continue their telemarketing activities, and to inform end users that they may change any previous selection by calling or writing the LEC business offices. We trust that the IXCs' marketing efforts will be more than adequate to inform end users of their opportunities to modify ballot choices.[26]

C. Retroactive and Post Conversion Allocation

21. GTE Sprint requests reconsideration of our decision not to require retroactive allocation. *See Allocation Order*, App. B, para. 25. It also requests that the Commission require that allocation take place 40 days after end office conversion. GTE Sprint Petition at 4, 7. GTE Sprint argues that later allocation would end users who failed to select an IXC "an opportunity" to place "trial" intercity calls by making all long distance calls by dialing the carriers' 10XXX codes. *Id.* GTE Sprint's first request is opposed by the New York Department of Public Service (NYDPS) and by AT&T. The NYDPS states that there is relatively little public benefit to be gained by retroactive allocation and that any small benefit must be weighed against the cost to the LECs and the potential for customer confusion.[27] Southwestern opposes GTE Sprint's request for post conversion allocation and "supports the flexibility incorporated in the Commission's Order" which allows each LEC to decide when allocation is to take place.[28]

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[25] Mountain Bell requested a waiver permitting it to contact the end user immediately, presumably by phone, to resolve disputes. The waiver was granted on condition that Mountain Bell also immediately notifies all IXCs involved in the selection dispute. The Bureau reasoned that immediate contact with the end user not only rendered timely assistance to consumers but also might assist the carrier in identifying procedural or mechanical causes of duplicate listings. We agree with the Bureau's conclusion and therefore reject SBS' suggested prohibition against such customer contact.

[26] We also deny SBS' related Petition for Reconsideration of the *Waiver Order*. *See* n. 19, *supra*.

[27] Letter from New York Department of Public Service to the Commission, CC Docket No. 83-1145, Phase I, filed Aug. 22, 1985.

[28] Opposition of Southwestern Bell Telephone Company to Petitions for Reconsideration, CC Docket No. 83-1145, Phase I, filed Aug. 26, 1985.

22. GTE Sprint has furnished no arguments other than those we previously considered in deciding not to impose retroactive allocation. Nor are we convinced that the public would be well-served by a mandatory postponement of allocation until the post-conversion period. Consumers allocated to an IXC remain free to test the services of other IXCs by dialing the 10XXX codes. We therefore deny GTE Sprint's petitions for modification of the Order in regard to retroactive allocation and the timing of allocation.

23. MCI requests elimination of the requirement that customers appearing on more than one IXC list be tentatively assigned an allocated carrier and notified of the conflict on a second ballot.[29] MCI suggests that we instead require that each LEC process conflicting orders according to its own dispute resolution procedures. The permissions granted previously in the *Waiver Order* to Bell Atlantic, Pacific Bell, NYNEX and Mountain Bell allow those companies to dispose of both IXC/IXC and IXC/ballot conflicts using modified procedures. We continue to believe that tentative allocation and notification by ballot is a simple and efficient method of resolving conflicts. Therefore, except in cases where a LEC requested and received permission in the *Waiver Order* for a modification to its dispute resolution procedures, we will retain the requirement that customers appearing on more than one IXC list be placed in the allocation pool and notified by a second ballot of the conflict. Such a procedure affords consumers both timely notice and ample opportunity to select another IXC if they are dissatisfied with the tentative assignment.

D. Allocation Reporting Requirements

24. SBS proposes that the Commission require that LECs (1) report end user designations to IXCs within one week of receiving that information, (2) provide reports reflecting end user choices on a weekly basis prior to end office cutover, and, (3) report that information in either a standard format such as that adopted by the EDP Committee of the Network Operations Forum (NOF),[30] or "in an alternative format that is adequately explained to the IXCs." SBS Petition at 6. LECs are currently required to provide the IXCs with a minimum of three reports, identifying customers who have designated the IXC as their primary long distance

[29] *See* Allocation Order, App. B, para. 23.

[30] The EDP Committee of the Network Operations Forum is an industry group established to develop standards for the exchange of records between IXCs and LECs. *See* SBS Petition at note 2.

carrier. *Allocation Order*, App. B, para. 28. SBS argues that these reporting requirements are inadequate to remedy the problems SBS has encountered in connection with end office cutovers. SBS reports that it often receives presubscription order information from the LECs too close to the end office cutover date to enable SBS to process the order in time for cutover. SBS Petition at 6. SBS also alleges that customer choice information provided by some LECs has been either incomplete or unintelligible, and that LECs in one region send customer information in two different formats, creating confusion. SBS Petition at 7.

25. BellSouth, NYNEX, and Southwestern oppose SBS' proposal.[31] Each opponent states that it provides more frequent reports that are required by the *Allocation Order*, but opposes further Commission prescription regarding timing or format. BellSouth suggests that we might require that order information be submitted by the LECs to the IXCs within "a reasonable time." BellSouth Opposition at 3. NYNEX argues that further reporting requirements will necessitate the expenditure of additional money and resources. Southwestern states that it currently supplies weekly reports to the IXCs and plans to implement a modified version of the standard format proposed by NOF.

26. Interexchange carrier reports of recurrent problems in obtaining timely, comprehensive and comprehensible presubscription order information from the LECs indicate that the reporting process may be deficient.[32] We do not believe, however, that deficiencies in current reporting procedures will be remedied by the imposition of additional reporting requirements. We support the efforts of the telecommunications industry, such as those of NOF, to establish for itself standards governing the exchange of records. Such groups can develop prototypes which the LECs can adapt to their own data bases, as Southwestern reports it has done. Preliminary reports from the IXCs also indicate that certain LECs appear to have made substantial progress in resolving reporting deficiencies. We are reluctant to interpose new reporting requirements in the face of such progress. We therefore deny SBS' petition to modify the reporting requirements. We also

[31] Opposition of the BellSouth Companies to Petitions for Reconsideration, CC Docket No. 83-1145, Phase I, filed Aug. 26, 1985 at 2 (BellSouth Opposition); Southwestern Opposition at 4; NYNEX Telephone Companies' Opposition to Petitions for Reconsideration, CC Docket No. 83-1145, Phase I, filed Aug. 26, 1985 at 4 (NYNEX Opposition).

[32] *See, e.g.*, MCI's Report to the Department of Justice on RBOC Compliance with Equal Access, filed Aug. 16, 1985 in United States v. Western Electric Co., Civil Action No. 82-0192 (D.D.C.).

direct the Common Carrier Bureau to monitor the LECs' compliance with the reporting requirements set forth in the *Allocation Order* and to recommend modifications if continued deficiencies are identified.

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that the petitions for reconsideration of the *Allocation Order* filed by US Telecom, Inc., MCI Telecommunications Corporation, Satellite Business Systems and GTE Sprint Communications Corporation ARE DENIED.

28. IT IS FURTHER ORDERED that the Petition for Waiver of the *Waiver Order* filed by Southwestern Bell Telephone Company IS GRANTED to the extent described herein and is otherwise DENIED.

29. IT IS FURTHER ORDERED that the Petition for Clarification of the Common Carrier Bureau's Conflict Guidelines filed by the Ameritech Companies IS GRANTED to the extent described herein and is otherwise DENIED.

30. IT IS FURTHER ORDERED that the Petition for Reconsideration of the *Waiver Order* filed by the BellSouth Corporation IS GRANTED to the extent described herein and is otherwise DENIED.

31. IT IS FURTHER ORDERED that the Petition for Clarification of the *Waiver Order* filed by Pacific Bell IS DENIED.

32. IT IS FURTHER ORDERED that the Petition for Reconsideration of the *Waiver Order* filed by Satellite Business Systems IS DENIED.

33. IT IS FURTHER ORDERED that the interstate access tariffs of any local exchange carriers that impose a change charge prior to end office conversion be revised to reflect the guideline set forth in this Order.

34. IT IS FURTHER ORDERED that Sections 61.58, 61.59 and 61.74 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, 61.74, are waived for the purposes of implementing this Order.

35. IT IS FURTHER ORDERED that this Order is effective upon the date of release.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Government Land, Broadcasting Facilities on

Remand

Site Availability

Review Board remands comparative TV proceeding to ALJ on site availability issue against winner below. The legal standard of reasonable assurance of site availability is based on site negotiation and applies equally to government-owned and privately-owned land. At a minimum, there must be a meeting of the minds as to the key lease terms upon which the land will be made available.

—Alden Communications Corp.

MM Docket No. 83-720

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Alden Communications Corp. Green Valley, Arizona	MM Docket No. 83-720 File No. BPCT-830311KF
Sungilt Corporation, Inc. Green Valley, Arizona	MM Docket No. 83-721 File No. BPCT-830311KN
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1985; Released: November 7, 1985

BY THE REVIEW BOARD:

1. Exceptions were filed to the Initial Decision of Administrative Law Judge Conlin, FCC 85D-26, released April 10, 1985, which granted the application of Sungilt Corporation, Inc. in the

above-captioned proceeding. The major claim of Alden Communications Corp., the competing applicant, is that Sungilt's proposed transmitter site is not available. Oral argument was originally scheduled for September 20, 1985 but was postponed after Sungilt belatedly filed, on September 18, a motion to reschedule the argument. When originally preparing for that argument, the Board preliminarily reviewed the hearing record in light of the exceptions and briefs. It has now concluded that an oral argument need not be rescheduled because a remand for further hearing is required to resolve a material and substantial question of fact: whether Sungilt has reasonable assurance of the availability of a transmitter site. *See South Florida Broadcasting Company, Inc.*, 99 FCC 2d 840, 57 RR 2d 495 (Rev. Bd. 1984). In essence, the undisputed factual allegations considered in the light of controlling precedent reveal that Sungilt has something less than "reasonable assurance" of its proposed transmitter site. We turn first to the controlling precedent.

2. Generally, an applicant is required to demonstrate that it has reasonable assurance — which "need not [be] a binding agreement or absolute assurance" — that its proposed transmitter site will be available to it; "but a mere possibility, assumption, or hope that the site will be available will not suffice." *Houston Family Television, Ltd.*, FCC 85R-56, released July 10, 1985, at para. 5 (*citing William F. Wallace*, 49 FCC 2d 1424, 1427, 32 RR 2d 105, 109 (Rev. Bd. 1974)). *See Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203, and 95 FCC 2d 444 (Rev. Bd. 1983), *rev. denied*, FCC 84-119 (Comm'n 1984), *aff'd per curiam sub nom. Royce International Broadcasting Co.* v. *FCC*, Case No. 84-1168 (D.C. Cir. April 30, 1985). An uncontradicted oral promise of a land owner to lease the proposed site to an applicant has been held to be sufficient to demonstrate reasonable assurance of site availability. *Eastside Broadcasting Co.*, 45 FCC 1202, 1203, 1 RR 2d 763, 765 (Rev. Bd. 1963). There are numerous ways in which reasonable assurance may be acquired, ranging from entering into a formal option to lease the land to informal discussions with the landowner or an authorized real estate agent that culminate in a meeting of the minds as to the key lease terms upon which the land will be made available. *Compare Milam and Lansman*, 4 FCC 2d 610 (1966) (adequate lease option agreement entered into with realtor authorized to lease site on building but not to approve alterations to roof) *with Cannon Communications Corp.*, 58 RR 2d 950, 953 (Rev. Bd. 1985) (agreement to discuss matter further is insufficient), *and Dutchess Communications Corp.*, 58 RR 2d 381,

388 (Rev. Bd. 1985) (landowner's indication of willingness only to *sell* the site is not reasonable assurance of a *lease*).

3. When an applicant who has obtained reasonable assurance from the land owner must also obtain a zoning change or equivalent further approval by a governmental authority in order to use the site for broadcast transmission, it nevertheless need not demonstrate such actual approval to the Commission; zoning-type approval is assumed absent indications that it is unlikely to occur. *See San Francisco Wireless Talking Machine Co., Inc.*, 47 RR 2d 889, 893 (1980) (*citing Eastside Broadcasting, supra*, and *Chronicle Publishing Co.*, 45 FCC 1545, 3 RR 2d 529 (Rev. Bd. 1964)). However, neither *San Francisco Wireless* nor any other case of which we are aware permits an applicant proposing to locate its transmitter on *government-owned* land to avoid the "reasonable assurance" legal standard by "assumption" of negotiation approval as if the issue were solely one of zoning. Thus, the legal standard of reasonable assurance is equally applicable to government-owned and privately-owned land. *Cf. Shoblom, supra.*

4. We now briefly summarize the key facts in this case. Sungilt's proposed Samaniego Peak transmitter site, specified originally in its application filed on March 11, 1983, and relied upon continuously ever since, is located on land owned and administered by the State of Arizona. In specifying this site, Sungilt's counsel conferred with Arizona State Land Department employees; however, letters in the record from Land Department officials reveal that these conversations never ripened into an oral understanding that the proposed location would be made available to the applicant as a transmitter site if it were to prevail in this proceeding. See Alden Exceptions, Annexes 2–7. Instead, the officials state that the Land Department's procedures require a broadcast applicant such as Sungilt to file a written application to lease the site. The officials further indicate that the filing of a lease application by Sungilt would trigger Land Department action to determine valuation of the land, whether to rezone the land from "grazing" to commercial use, whether or not to approve the lease and, if so, to determine the rent to be charged Sungilt, the length of the lease, and other essential lease terms.

5. Sungilt urges that its counsel "determined" from his conversations with the Land Department "that the site was available as an antenna site," *id.*, Annex 3, and that the Land Department "would willingly accept and process a formal application" of Sungilt's, possibly resulting in a lease of the site, *id.*, Annex 6, However, contemporaneous with these conversations, and after,

the Land Department has made clear that no determination has been made as yet to grant anyone a commercial lease on the site, *id.*, Annexes 5, 7, thus apparently vitiating any reasonable assurance Sungilt thought it may have had. *See Shoblom, supra.* In sum, as of this date, Sungilt and the Land Department have apparently reached no consensus on any lease terms, and Sungilt has not yet filed an application for a lease. Indeed, the Land Department insists that it has not "given anyone any assurances as to the availability of the *Samaniego Peak Site.*" *Id.*, Annex 2.

6. Sungilt also urges that Arizona State statutes "establish a presumptive right to use all state land for commercial purposes" for a term of ten years and that Land Department regulations "set the annual lease rate at the greater of six hundred dollars per year or ten percent of land value." Sungilt Reply at 8. However, as shown above, the Land Department — the Arizona State governmental arm apparently entrusted with interpreting the statutes in question in the first instance — has indicated that it will only consider whether to grant a lease based on a full application therefor and that the lease term, which is at most ten years, and the value of the land, upon which the rent will be based, are yet to be established. Therefore, we find the record to be barren of any indication of a negotiated understanding between Sungilt and the land owner, the State of Arizona, as to whether and upon what terms Sungilt may lease its proposed transmitter site. Controlling precedents therefore require that we specify an appropriate issue. *E.g., South Florida, supra.*

7. Alden's exceptions also seek the addition of various other issues — site suitability, financial, and misrepresentation — which relate to the site availability question. Alden's allegations concerning these additional issues are insufficient and too speculative to warrant designating any of them for hearing at this time. *See 47 CFR § 1.229(d); cf. Gary D. Terrell,* FCC 85R-82, released October 7, 1985, at para. 4. However, the ALJ is authorized to add any or all of these issues if the evidence developed at the remand hearing so warrants. *See South Florida Broadcasting, supra,* 99 FCC 2d at 849 n. 24, 57 RR 2d at 502, n. 24.[1]

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[1] On October 3, 1985, well after the date exceptions were filed, Alden filed a Petition for Official Notice of a September 30, 1985 Land Department letter, prepared at Alden's request, which purportedly reaffirms the Department's previous letters already on record here. We shall deny this petition, which is superfluous to our determination to remand the case, and which appears to request notice of facts which may be in dispute. *See Fed. R. Ev.* 201(b); *Mark L. Wodlinger,* FCC 85R-62, released August 6, 1985, at n.5. Nevertheless, Alden is free to seek admission of the letter into evidence in the remanded

8. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed July 25 and 26, 1985 by Alden Communications Corp. ARE GRANTED, and the amendment IS ACCEPTED subject to the condition that no comparative upgrading will be recognized therefrom; and

9. IT IS FURTHER ORDERED, That the petition for official notice filed October 3, 1985 by Alden Communications Corp. IS DENIED; and

10. IT IS FURTHER ORDERED, That the motion to accept a late filed pleading and the motion to strike and motion to impose a sanction filed October 22, 1985 by Sungilt Corporation, Inc. ARE DISMISSED; and

11. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for adduction of evidence on the following issue and the issuance of a Supplemental Initial Decision:

> To determine whether Sungilt Corporation, Inc. has reasonable assurance of the availability of a transmitter site;

12. IT IS FURTHER ORDERED, That the burden of introduction of evidence on the above issue SHALL BE on Alden Communications Corp. and that the burden of proof SHALL BE on Sungilt Corporation, Inc.

FEDERAL COMMUNICATIONS COMMISSION

JOSPEH A. MARINO, *Chairman, Review Board*

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proceeding. In view of this ruling, we shall also dismiss as moot Sungilt's October 22, 1985 Motion to Strike and Motion to Impose a Sanction, which was filed in response to Alden's Petition for Official Notice.

FCC 85D-26

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Alden Communications Corp. Green Valley, Arizona	MM Docket No. 83-720 File No. BPCT-830311KF
Sungilt Corporation, Inc. Green Valley, Arizona	MM Docket No. 83-721 File No. BPCT-830311KN
For Construction Permit	

Appearances

Jerome S. Boros, Esq. and *Jerome S. Silber, Esq.* on behalf of Alden Communications Corp.; *Booker T. Wade, Esq.*, *Michele A. Moore, Esq.* and *Thomas Hendrickson, Esq.*, on behalf of Sungilt Corporation, Inc. and *Charles Dziedzic, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued: April 5, 1985; Released: April 10, 1985

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Alden Communications Corp. ("Alden") and Sungilt Corporation, Inc. ("Sungilt"). Each applicant seeks to establish a UHF television station on Channel 46 at Green Valley, Arizona.[1]

[1] Originally, the proceeding involved four applicants. The application of Green Valley Television, Inc., was dismissed by *Order*, FCC 84M-954, released February 24, 1984. The application of Skyline Communications Group was dismissed by *Order*, FCC 84M-5014, released November 30, 1984.

2. By *Hearing Designation Order* (MM-5302, released July 14, 1983) the applications were consolidated for hearing on the following issues:[2]

1. To determine with respect to Alden whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

2. To determine with respect to Sungilt Corporation, Inc.:

(a) the number, identity and legal qualifications of the officers of Sungilt Corporation, Inc.;

(b) whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant complied with Section 73.3514(a) of the Commission's Rules; and

(c) in light of the evidence adduced pursuant to the foregoing issues, the effect of any omissions on the applicant's basic or comparative qualifications.

3. To determine the areas and populations that would receive Grade B or better service from the proposals and the availability of other Grade B services to such areas and populations.

4. To determine which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. On October 24, 1983, the Presiding Judge accepted an Alden amendment containing an FAA determination of "No Hazard" and granted Summary Decision in favor of Alden on Issue 1. (FCC 83M-3794, released October 24, 1983). By *Order*, FCC 83M-3038, released September 6, 1983, the Presiding Judge deleted the issue concerning Sungilt's legal qualifications. However, by *Memorandum Opinion and Order*, FCC 84M-036, released January 6, 1984, a legal qualifications issue based on different grounds was specified against Sungilt:

> To determine whether Sungilt Corporation, Inc., is legally qualified to become a licensee of the Commission.

On February 28, 1984, the Presiding Judge granted Summary Decision to Sungilt on the legal qualifications issue (Tr. 28-30).

4. By *Memorandum Opinion and Order*, FCC 84M-429, released January 26, 1984, the Presiding Judge added a city-grade

[2] Issues relating to the dismissed applicants (n. 1 supra) have been omitted.

coverage issue against Sungilt:

> To determine whether the engineering proposal of Sungilt Corporation, Inc. complies with Section 73-685(a) of the Commission's Rules, and, if not, whether circumstances exist which would warrant waiver of the rule.

By *Order*, FCC 84M-2333, released May 17, 1984, Sungilt's amendment designed to bring its technical proposal into compliance with the Commission's Rules was accepted; by *Memorandum Opinion and Order*, FCC 84M-2826, released June 22, 1984, the Presiding Judge granted *Summary Decision* in favor of Sungilt on the city-grade coverage issue. Thus, the only factual issues remaining for decision are the areas and populations issue and the comparative issue.

5. A pre-hearing conference was held on September 30, 1983. Hearing was held on February 28-29, 1984 and May 22, 1984. The record was closed on June 26, 1984 (*Order*, FCC 84M-2968, released June 26, 1984). Proposed findings and conclusions were filed on or about October 22, 1984 and replies were submitted on December 10.[3]

Findings of Fact

Comparative Coverage Issue

6. The applicants propose to serve the following areas and populations within their Grade B contours (Alden Exh. 6, p. 5; Tr. 197):

Applicant	*Area (Sq. Miles)*	*Population*
Alden	9,009	564,208
Sungilt	4,763	468,240

[3] It is noted that American Cable Television, Inc. was permitted to intervene in the case. FCC 83M-4008, released November 3, 1983. It did not participate in the trial but filed reply findings and a supplement thereto on November 13 and December 27, 1984, respectively. Interventor's sole interest in the proceeding is in obtaining a condition on any grant to Alden protecting in the proceeding is in obtaining a condition on any grant to Alden protecting its CARS facility located on Keystone Peak, Arizona from interference. In view of the result reached herein, construction of this matter is unnecessary.

The service to areas with fewer than five Grade B signals is as follows:

Services Available	*Area (Sq. Miles)*	*Population*
0	693	867
1	227	284
2	353	2,829
3	60	151
4	540	2,626
Total	1,873	6,757

Sungilt proposes service to underserved areas as follows:

Services Available	*Area (Sq. Miles)*	*Population*
0	--	--
1	27	34
2	300	2,747
3	--	--
4	271	1,582
Total	598	4,363

7. Thus Alden would serve a white area (693 square miles) which has a population of 897; and a gray area (227 square miles) with a population of 284. Sungilt would not provide service to any white area but would serve a gray area of 34 people. Alden would also provide a third service to 2,829 people; a fourth service to 151 period and a fifth service to 2,629 people. Sungilt would provide a third service to 2,747 and a fifth service to 1,582 people. In all Alden would provide service to 2,394 people in a 1,275 square mile area who presently receive fewer than five services and who would not be served by Sungilt.

8. The population of Pima County, the principal area of service, grew from 351,667 in 1970 to 531,443 in 1980 (a 51.1% increase) while that of the Papago Division, in which the white and gray areas to be served by Alden are situated, grew from 4,447 in 1970 to 6,436 (a 44.8% increase) in 1980.[4]

Integration of Ownership with Management

9. Alden is a California corporation, beneficially owned by Michael R. Forman, its President and Director. Ted Minsky is Vice-President of Alden. Forman and Minsky do not propose to participate in the management of the proposed station.

10. Sungilt is a Delaware corporation. Its sole shareholder is Arlene Stevenson. She is Sungilt's proposed General Manager and

[4] U.S. Census 1980; Characteristics of the Population — Chapter A: Number of Inhabitants; Part 4 Arizona PC80-1-A4; pg. 4-10.

intends to work at least 40 hours at the station.

11. Ms. Stevenson is a black woman who has lived in Tucson since 1970, but proposes to move to Green Valley if Sungilt's application is granted.[5] She was born in New York City and attended high school there. She holds three degrees: An A.A. from Queensborough Community College, New York (1963), a B.A. in Spanish Language and Literature from Hunter College in New York (1966), and a Masters in English from the University of Arizona in Tucson (1971). She also attended the University of Barcelona, in Spain, receiving a Certificate of Excellence in the study of Spanish language and Literature. Ms. Stevenson is employed at Pima Community College in Tucson where she teaches English as a second language.

12. Ms. Stevenson has worked as in intern for KZAZ-TV, Tucson, and has studied broadcasting as a memer of the Arizona Media Program and at the Univeristy fo Arizona. (Sungilt, Ex. 3, page 4). She has attended broadcast related seminars and training sessions given by the National Association of Broadcasters, New York University and Hofstra University. (Sungilt, Ex. 3).

13. Ms. Stevenson has been involved in the following civic activities in Tucson: Ad Hoc Committee to establish Women's Commission in Tucson, Arizona (April-November 1975); Volunteer Registrant for voters (March 1976); Regional Delegate for Second Congressional District to the convention for presidential election (April 1976); Campaign Worker for Governor Bruce Babbit (Fall 1978).

Diversification of Media Control

14. Alden has a passive ten percent (10%) interest in a UHF permittee in Las Vegas, Nevada. As of the B cut-off date, Michael R. Forman was 100% stockholder of Tavitac Corporation (Tavitac), which had an 80% interest in Greater Portland Broadcasting Corporation, permittee of UHF Channel 24, Portland, Oregon. Alden Television, Inc. ("ATI") held the remaining 20% interest in GPBC. Pacific Theatres Corporation ("Pacific Theatres) is the sole stockholder of ATI, and Michael R. Forman votes the stock of Pacific Corporation, permittee of UHF Channel 22, Seattle, Washington.[6] In addition the Review Board has recently

[5] Her Tucson residence lies within the service area of the proposed station.

[6] Alden has filed an amendment reporting the proposed transfer of control of the Portland and Seattle permittees from Tavitac Corporation to Alden Television, Inc. The Presiding Judge has accepted that amendment (FCC 84M-3738 released August 29, 1984). Pursuant to Commission consent (BTC-

awarded a construction permit for a UHF station in Denver, Colorado to a company owned by Mr. Forman.[7]

15. Through Pacific Theatres Corporation, Mr. Forman has operating control of, and an interest in, companies which engage in motion picture theatrical exhibition in various communities in the United States. These theatres, approximately 240 in number are located in Arizona, California, Hawaii, New York and Washington. The only theatre in Arizona is about 200 miles from Green Valley.[8]

16. Neither Sungilt nor its sole principal, Arlene Stevenson, has an interest in any medium of mass communications.

Conclusions

Comparative Coverage

17. Alden is entitled to a preference in this area of comparison. It will serve 20% more people than Sungilt (564,208 vs. 468,240); it will bring a third or fourth service to 233 more people than Sungilt; and finally it will bring a second service to 250 more people than Sungilt and a first service to 867 people, whereas Sungilt would provide no first service at all. The first of these factors entitles Alden to a slight preference; the second indicates a slight advantage for Alden, but the number of people served is far short of the "substantial populations" that would entitle Alden to a slight preference for providing a third or fourth service. Finally providing a first or second service to 867 people and 250, respectively, is a factor of some importance; but here again the relatively small numbers involved preclude the award of a strong preference. Weighing all these consideration, the presiding officer concludes that Alden should be accorded a moderate preference for its proposed coverage.[9]

CT-840629KG and BTCCT-840629KO), the transactions have been consummated.

[7] See *Colorado Television, Inc.*, 56 RR 2d 1080 (1984). An appeal is presently pending before the Commission.

[8] These interests are derived from Alden Ex. 4; but see *Colorado Television, Inc.*, supra at 1087, which attributes to Alden a higher number of theatres in a wider geographic area.

[9] This analysis is based on *Christian Broadcasting of the Midlands, Inc.*, 57 RR 87 2d, 91-92 (Rev. Bd. 1984), and the cases cited therein. In that case the Board awarded a "moderate-to-substantial" preference, but the disparities between the respective applicants, particularly with respect to provision of a second third and fourth service were much greater than here; thus, the moderate preference for Alden.

Integration of Ownership with Management

18. Alden offers no integration of ownership with management. Sungilt's integration involves 100% fulltime integration by Ms. Stevenson, who will serve as general manager. In addition, Ms. Stevenson, Sungilt's sole stockholder, is a black female and a resident of the area with some record of participation in civic affairs. Sungilt is therefore awarded a substantial preference in this area of comparison.

Diversification

19. Alden's beneficial owner is Michael R. Forman. His broadcast interests include ownership of the permittees for UHF stations in Seatle, Washington, and Portland, Oregon and a minority interest (10%) in the permittee for a UHF station in Las Vegas, Nevada. He also has received a construction permit for a UHF station in Denver, Colorado, a grant which has not yet become final. In addition, Forman has a controlling interest in a corporation which owns and operates numerous motion picture theatres located primarily on the West Coast, Hawaii and New York. One theatre is located in Arizona.

20. Neither Sungilt nor its sole principal, Ms. Stevenson, holds any interest in any medium of communication.

21. Clearly, Sungilt is entitled to a preference in this area of comparison. Since the interests attributable to Alden are located a considerable distance from Green Valley the preference will be characterized as modest.

22. In sum, Sungilt has received a substantial preference for integration of ownership with management and a modest preference for diversification. Alden has received a modest preference for comparative coverage. The strength of Sungilt's integration preferences more than offsets Alden's coverage advantage; thus it is concluded that in terms of providing the best practical service to the public Sungilt must be preferred. Having also achieved a preference for diversification of ownership of mass media, Sungilt is the superior applicant in terms of meeting both of the primary objectives of the comparative evaluation (See *Policy Statement on Comparative Broadcast Hearing*, 1 FCC 2d 993 (1965). The public interest would therefore be better served by a grant to Sungilt.

Accordingly, IT IS ORDERED than unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Sungilt Corporation, Inc. IS

GRANTED and the application of Alden Communications Corp. IS DENIED.[10]

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Contract Filing With FCC
Foreign Communications
International Agreements and Treaties
Reports, Required to be Filed
Rulemaking, Notice of Proposed

This Rulemaking proposes to streamline FCC rules pertaining to the filing of contracts by eliminating routine filing of contracts by non-dominant carriers treated with forbearance and also proposes to eliminate routine filing of certain reports.
—*Amendment of Part 43*
CC Docket No. 85-346

FCC 85-601

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements	CC Docket No. 85-346

NOTICE OF PROPOSED RULEMAKING

Adopted: November 13, 1985; Released: November 21, 1985

BY THE COMMISSION:

I. INTRODUCTION

1. In this Notice, we are proposing revisions to Part 43 of the Commission's Rules and Regulations, 47 C.F.R. Part 43, concerning the filing of contracts and other reporting requirements pertaining to carriers' agreements and charges. This proposal provides for: (1) elimination of the filing of contracts by non-dominant carriers treated with forbearance; and (2) elimination of

reports of negotiations regarding foreign communication matters, reports regarding services not covered by a tariff, and reports of service rendered free or at reduced rates for all carriers.

II. BACKGROUND

2. Pursuant to Part 43 of the Commission's Rules and Regulations, communications common carriers are required to file with the Commission contracts and reports as follows:

Section 43.51: Contracts and concessions. Requires the filing of contracts between carriers for: (1) the exchange of services, (2) the interchange or routing of traffic and matters concerning rates and division of tolls, and (3) agreements with foreign governments.

Also requires subject carriers to maintain on file at their offices contracts with connecting carriers.

Section 43.52: Reports of negotiations regarding foreign communication matters. Requires the filing of a monthly report by each carrier engaged in foreign traffic covering all negotiations, written or oral, initiated during the previous month with any foreign administration or carrier.

Section 43.53: Reports regarding division of international telegraph communication charges. Requires the filing of a report by any carrier engaged in overseas telegraph communications describing the arrangements for division of tolls with the foreign countries involved.

Section 43.54: Reports regarding services performed by telegraph carriers. Requires the filing of reports by telegraph carriers for service that is not covered by a tariff. The services covered by this section include, for example, communication service wholly within or between foreign countries, the leasing of wires to other communication carriers, errand service by messenger, time service and burglar alarm service.

Section 43.74: Service rendered free or at reduced rates pursuant to Section 396(h) of the Communications Act. Requires the filing of reports of free or reduced rates for noncommercial educational television or radio services.

3. Some of the data reported pursuant to these sections may no longer be useful. Through the *Competitive Carrier Rulemaking*[1]

[1] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Second Report and Order, 91 FCC 2d 59 (1982), *recon.*, FCC 83-69, released Mar. 21, 1983, Second Further Notice of Proposed Rulemaking, FCC No. 82-187,

the Commission has reduced or eliminated unnecessary regulatory burdens on non-dominant common carriers because of a determination that these carriers face strong competition in the marketplace. As to certain of these non-dominant carriers, the Commission concluded that it could forbear from regulating altogether. The Commission concluded that the complaint process under Section 208 of the Communications Act, 47 U.S.C. § 208, market forces and the Commission's power to reimpose tariff filing and facilities authorization requirements if necessary were sufficient to check these carriers' ability to charge unjust, unreasonable or discriminatory rates. We no longer require the filing of tariffs by non-dominant carriers treated with forbearance.

III. DISCUSSION

4. For the same reasons which have led us to adopt the policies described in the preceding section, we tentatively conclude that it is within our discretion to exempt non-dominant carriers from filing copies of contracts. Section 211(a) of the Act, 47 U.S.C. § 211(a), requires that every carrier file contracts with other carriers affecting traffic regulated under the Act. Section 211(b) provides that the Commission "shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine." Due to non-dominant carriers' lack of market power, and the competitive forces which surround them, we conclude that any contract between non-dominant carriers can be reasonably interpreted as "minor" and thus subject to our exemption power under Section 211(b).[2] We further tentatively find that the costs of filing those contracts and of maintaining them in the Commission's files outweigh any limited benefits of their being on file. If any party can demon-

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released Apr. 21, 1982, Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983), Third Report and Order, Mimeo No. 012, released Oct. 6, 1983, 48 Fed. Reg. 46,791 (Oct. 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fourth Further Notice of Proposed Rulemaking, FCC 84-82, released Mar. 22, 1984, 49 Fed. Reg. 11,856, (Mar. 28, 1984), Fifth Report and Order, FCC 84-394, released Aug. 27, 1984, 49 Fed. Reg. 34824 (Sept. 4, 1984), Sixth Report and Order, FCC *84-566*, released Jan. 4, 1985, 50 Fed. Reg. 1215 (Jan. 10, 1985), *rev'd sub nom. 5). MCI Telecommunications Corp. v. F.C.C., No. 85-1030 (D.C. Cir. 1985).*

[2] The legislative history of the Act indicates that the "minor" contracts referred to in Section 211(b) are any traffic contracts referred to in Section 211(a) which the Commission determines to be minor. *See* H.R. Report No. 1850, 73d Cong., 2d Ses. (June 1, 1934), at 6; Statement of Sosthenes Behn, Hearings before H.R. Comm. on Interstate and Foreign Commerce, 73d Cong. 2d Sess., on H.R. 8301, April 10, 1934, at 228.

strate that a limited category of non-dominant carrier contracts is not minor within the meaning of Section 211(b), we would consider requiring the subject carriers to retain those contracts on file in their offices. See Section 43.51(e) of the Rules, 47 C.F.R. § 43.51."

5. Further, certain reports heretofore considered valuable are no longer necessary for the Common Carrier Bureau staff to perform its monitoring of carrier activities. This is particularly true in the case of non-dominant carriers which do not have the power to control prices in the marketplace. The complaint procedures available under the Communications Act will be more than sufficient to obtain any information needed. Thus, the requiring of recurring reports appears to be wasteful. In addition, these reports also seem to be unnecessary due to lack of interest by the public in the reports. During the past three to four years we have had few or no requests from the public to review these various reports, which leads us to believe that the preparation and routine filing of such reports are wasteful and unnecessary.

6. We are, therefore, soliciting comments on our proposal to eliminate the requirements for filing of contracts and reports by non-dominant carriers treated with forbearance except upon Bureau staff request.[3] We are unaware of any reason why we should continue to require copies of these documents to be filed routinely with us.

7. We also seek comments on the proposal to eliminate the filing of reports of negotiations regarding foreign communication matters. It is our tentative view that these reports are not of substantial value to the Bureau staff since any negotiations that result in a contractual agreement can be made known to the staff through the contract, if required to be filed, or can be requested by the staff. The simple notification that negotiations are occurring does not seem to serve any useful purpose.

8. We also seek comments on the proposal to eliminate the requirement for filing of reports regarding services performed by telegraph carriers. This report has likewise become of less value to

[3] Further, we seek comments on the revisions in Section 43.53(a) being proposed to more accurately describe the reports currently being provided. These include: (1) substituting the word "toll" for "telegraph" to indicate the requirement for filing division of tolls for voice and data services as well as telegraph, (2) striking the word "continental" so as to include communications from Alaska, Hawaii etc., (3) changing the word "country" to "jurisdiction" to more correctly describe points such as Bermuda and Hong Kong, and (4) adding language to specify the toll charge information required to be filed, such as accounting rate, settlement rate and currency data.

the Bureau staff. The services in question are provided by non-dominant carriers and the reports concerning these services are no longer needed by the staff. In addition, the public has not expressed any interest in this information during the past several years. Further, since the Commission does not require the filing of similar reports by non-telegraph carriers, it is our tentative view that this proposed elimination will further the equitable treatment of carriers.

9. Further, we seek comments concerning the elimination of the requirement for filing of reports of free or reduced rates for noncommercial educational television or radio services. This report appears to be of little value to the Bureau staff, and the public has not, in recent years, expressed sufficient interest in the report to warrant its continued filing.

10. Finally, we seek comments on any other problems related to the issues presented here that interested parties may raise.

11. Through this proceeding, we seek to relieve carriers of the burden of preparing reports which no longer appear necessary. We have set forth in the Appendix to this Notice those specific rule changes that we tentatively find to be warranted. The Commission believes that the amendment of Part 43 it is proposing would be in furtherance of the Paperwork Reduction Act of 1980, 44 U.S.C. Section 3501 *et seq.* Under this Act an agency is required to review its Rules and Regulations and determine whether they are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. The Commission believes that the modifications discussed in the NPRM are in compliance with the Paperwork Reduction Act of 1980. However, implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

REGULATORY FLEXIBILITY ACT CERTIFICATION

12. Pursuant to the Regulatory Flexibility Act of 1980, it is certified that the rule changes proposed in this proceeding are exempt from application of the statute because they will not have a significant economic impact on a substantial number of small entities. This certification shall be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to Section 605 of the Regulatory Flexibility Act, 5 U.S.C. § 605.

ORDERING CLAUSES

13. Pursuant to our authority under Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, IT IS ORDERED that this rulemaking proceeding is instituted. Comments on the proposed rule changes shall be due on December 30, 1985, with reply comments due on January 14, 1986.

14. For purposes of this non-restricted notice and comment proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts this Notice until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final Order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules and Regulations, 47 C.F.R. § 1.1231.

15. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Order.

16. In accordance with the provisions of Section 1.419(b) of the Commission's Rules and Regulations, 47 C.F.R. § 1.419(b), an original and six copies of all comments, replies, pleadings, briefs

and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters at 1919 M Street, N.W., Washington, D.C.

17. The Secretary of the Commission shall cause a copy of this Notice to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

PROPOSED RULES

It is proposed to amend Part 43 of the Commission's Rules, 47 C.F.R. Part 43, as follows:

1. Section 43.51 is amended to read:

§ 43.51 Contracts and concessions.

Any communications common carrier engaged in domestic or foreign communication, or both, which has not been classified as non-dominant pursuant to Part 61.12(e) of the Commission's Rules and which enters into a contract with another carrier must file with the Commission within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization or other arrangement to which it is a party and amendments thereto with respect to the following: (a) the exchange of services; (b) the interchange or routing of traffic and matters concerning rates, division of tolls, or the basis of settlement of traffic balances; and (c) the rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations. If the agreement is made other than in writing, a certified statement covering all the details thereof must be filed by at least one of the parties to the agreement. Each other party to the agreement which is also subject to these provisions may, in lieu of also filing a copy of the agreement, file a certified statement referencing the filed document. The Commission may request any communication common carrier classified as non-dominant and therefore not subject to the provisions of this section, to submit such documents at any time.

2. Section 43.52 is deleted.

3. Section 43.53 is amended to read:

§ 43.53 Reports regarding division of international toll communication charges.

(a) Each communication common carrier engaged directly in the transmission or reception of communications between the United States and any foreign jurisdiction must file a report with the Commission within thirty (30) days of the date of any arrangement concerning the division of the total toll charges, including accounting rate, settlement rate and currency data, on such communications other than transiting. A carrier first becoming subject to the provisions of this section must, within thirty (30) days thereafter, file with the Commission a report covering any such existing arrangements.

(b) In the event that any change is made which affects data previously filed, a revised page incorporating such change or changes must be filed with the Commission not later than thirty (30) days from the date the change is made: Provided, however, that any change in the amount of foreign participation in charges for outbound communications or in the respondent's participation in charges for inbound communications must be filed not later than thirty (30) days from the date of the change is agreed upon.

(c) A single copy of each such report must be filed in a format required by the Commission.

4. Section 43.54 is deleted.

5. Section 43.74 is deleted.

PROPOSED SECTION

§ 43.51 Contracts and concessions.

Any communications common carrier engaged in domestic or foreign communication, or both, which has not been classified as non-dominant pursuant to 61.12(e) of the Commission's Rules and which enters into a contract with another carrier must file with the Commission within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization or the arrangement to which it is a party and amendments thereto with respect to the following: (1) the exchange of services; (2) the interchange or routing of traffic and matters concerning rates, division of tolls, or the basis of settlement of traffic balances; and (3) the rights granted to the carrier by any foreign government for landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations. If the agreement is made other than in writing, a certified statement covering all details thereof must be filed by at least one of the parties to the agreement. Each other party to the agreement which is also subject to these provisions may, in lieu of also filing a copy of the agreement, file a certified statement referencing the filed document. The Commission may request any communication common car-

CURRENT SECTION

§ 43.51 Contracts and concessions.

(a) Each communication common carrier shall file with the Commission, within thirty (30) days of execution (or within 30 days of a carrier first becoming subject to the provisions of this section), a copy of each contract, agreement, concession, license, authorization, or other arrangement to which it is a party with respect to communication traffic affected by the Communications Act of 1934, as amended, relating to the following:

(1) The exchange of services between such carrier and any carrier not subject to the act;

(2) Except as provided in paragraph (e) of this section, the interchange or routing of traffic and matters concerning rates, division of tolls, or the basis of settlement of traffic balances; or

(3) Rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations.

(b) Except as provided in paragraph (e) of this section, a copy of each modification, amendment, or cancellation of any instrument re-

rier classified as non-dominant and therefore not subject to the provisions of this section, to submit such documents at any time.

quired to be filed under the provisions of paragraph (a) of this section shall likewise be filed within thirty (30) days after execution.

(c) Except as provided in paragraph (e) of this section, if any contract, agreement, concession, license, authorization, or other arrangement, or change therein, as contemplated in paragraphs (a) and (b) of this section, is made other than in writing, a certified statement covering all details thereof shall be filed within thirty (30) days from the date it is made.

(d) Except as provided in paragraph (e) of this section upon the filing of any item required by paragraphs (a) to (c) of this section by one of two or more carriers subject to these provisions, each other party to the agreement may, in lieu of also filing a copy thereof, file a certified statement appropriately identifying the document and concurring in the contents thereof, as filed.

(e) With respect to contracts coming within the scope of paragraph (a)(2) of this section between subject telephone carriers and connecting carriers, except for those which relate to communications with foreign or overseas points, such contracts shall not be filed with the Commission; but each subject telephone carrier shall maintain a copy of such contracts to which it is a party in appropriate files at a central location upon its premises, copies of which contracts shall be readily accessible to Commission staff and members of the public upon reasonable request therefore; and upon request by the Commission, a subject telephone carrier shall promptly forward individual contracts to the commission.

PROPOSED SECTION

Section 43.52 is deleted.

CURRENT SECTION

§ 43.52 Reports of negotiations regarding foreign communication matters.

Not later than the tenth day of each month, each communication common carrier engaging in or participating directly in foreign telegraph or telephone traffic affected by the Communications Act of 1934, as

amended, shall file with the Commission a single copy of a report covering all negotiations, written or oral, initiated or conducted during the preceding calendar month with any foreign administration, agency, or carrier for (a) the establishment of a direct or indirect circuit between the United States and any foreign or overseas point, other than temporary arrangements for emergency routing of traffic, (b) any new foreign traffic contract, agreement, concession, license, or authorization, or (c) any change or modification in any such existing arrangement. The report shall be prepared in such manner as to show separately all data relating to each country. If no such negotiations have been initiated or conducted during the preceding month the report shall so state: *Provided, however*, That any carrier whose only foreign communication consists of traffic to and from Canada or Mexico need not file a report for any month in which no negotiations have taken place. Each report shall be certified as true and correct to the best of the knowledge and belief of a responsible official of the carrier.

§ 43.53 Reports regarding division of international toll communication charges.

(a) Each communication common carrier engaged directly in the transmission or reception of communications between the United States and any foreign jurisdiction shall file a report with the Commission within thirty (30) days of the date of any arrangement concerning the division of the total toll charges, including accounting rate, settlement rate and currency data, on such communications other than transiting. A carrier first becoming subject to the provisions of this section shall, within thirty (30) days thereafter, file with the Commission a report covering any such existing arrangements. A separate page of the report shall be devoted to inbound and a separate page to outbound communications with respect to each normal route to each country of origin or destination.

§ 43.53 Reports regarding division of international telegraph communication charges.

(a) Each communication common carrier engaged directly in the transmission or reception of telegraph communications between the continental United States and any foreign country (other than one to which the domestic word-count applies) shall file a report with the Commission within thirty (30) days of the date of any arrangement concerning the division of the total telegraph charges on such communications other than transiting. A carrier first becoming subject to the provisions of this section shall, within thirty (30) days thereafter, file with the Commission a report covering any such existing arrangements. A separate page of the report shall be devoted to inbound and a separate page to outbound communications with respect to each normal route to each country of origin or destination.

PROPOSED SECTION

(b) In the event that any change is made which affects data previously filed, a revised page incorporating such change or changes must be filed with the Commission not later than thirty (30) days from the date the change is made: Provided, however, that any change in the amount of foreign participation in charges for outbound communications or in the respondent's participation in charges for inbound communications must be filed not later than thirty (30) days from the date the change is agreed upon.

(c) A single copy of each such report must be filed in a format required by the Commission.

Section 43.54 is deleted.

CURRENT SECTION

(b) In the event that any change is made which affects data previously filed, a revised page incorporating such change or changes shall be filed with the Commission not later than thirty (30) days from the date the change is made: *Provided, however,* That any change in the amount of foreign participation in charges for outbound communications or in the respondent's participation in charges for inbound communications, shall be filed not later than thirty (30) days from the date the change is agreed upon.

(c) A single copy of each such report shall be filed on forms similar to those adopted by the Commission and

in compliance with the instructions thereto. Sample forms will be furnished upon request.

§ 43.54 Reports regarding services performed by telegraph carriers.

(a) Each common carrier primarily engaged in furnishing telegraph service upon commencing the performance of, or the participation in, any new type of transmission or nontransmission service that is not covered by a tariff filed with the Commission, or that discontinues entirely any such existing service, shall, within thirty (30) days thereafter, file with the Commission a single copy of a report giving a description and full particulars thereof. A carrier first becoming subject to the provisions of this sec-

tion shall, within thirty (30) days thereafter, file with the Commission a single copy of a report giving a description of existing services not covered by tariff filings. Each such report shall be certified as true and correct to the best knowledge and belief of a responsible official of the carrier.

(b) Among the services which may be covered by this section are the following: Communication service wholly within or between foreign countries; the leasing of wires to other communication carriers; errand service by messenger; time service; burglar alarm service; pick-up and delivery for other carriers; leasing of other than telegraph plant; the sale, installation, maintenance or inspection of equipment for others; accounting, legal, engineering and other services performed for others; merchandising, jobbing, and contracting services; frequency measuring service; and stock quotation service.

PROPOSED SECTION

Section 43.74 is deleted.

CURRENT SECTION

§ 43.74 Service rendered free or at reduced rates pursuant to section 396(h) of the Act; reports relative thereto.

Any common carrier subject to the Communications Act may render free or reduced rate communications interconnection services for noncommercial educational television or radio services, subject to the rules contained in this part. Every carrier furnishing such service shall make and file, in duplicate, with the Commission within 40 days after the end of each calendar quarter, two certified copies of reports covering each quarter of the year. The reports shall show the call signs and locations of the stations to which such service was rendered pursuant to this rule and the dates such service was rendered; the names of any agency, corporation or association of stations, other than the stations interconnected, to which service was charged or credited: the general character of the service provided: the charges in dollars which would have accrued to the carrier for such services rendered

if all charges for such services had been calculated at the published tariff rates: the charges in dollars, if any, actually made or credited for such service: the name and address of any person whose request for such service is pending as of the last day of the reporting period, the date of such request, a general description of the service requested, and the expected date of decision on the pending request: the name and address of any person whose request for such free or reduced rate service has been denied during the reporting period together with a general description of the service requested, and the reasons for such denials of service and the dates thereof.

Foreign Country, Transmission to
International Broadcast Station
International Broadcasting

Revisions made in the requirements of Section 73.702(f) of the rules regarding operation of international broadcast stations in ITU Region 3 in the 7100-7300 kHz band.
—*Amendment of Part 73*
MM Docket No. 84-706

FCC 85-545

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 73.702(f) Regarding Frequency Assignments for the International Broadcast Service	MM Docket No. 84-706 RM-2959

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 9, 1985; Released: October 15, 1985

BY THE COMMISSION:

Introduction

1. The Commission has before it a petition for reconsideration of the *Report and Order*, in this proceeding, (50 Fed. Reg. 15146, published April 17, 1985), filed by the American Radio Relay League, Incorporated (the "League") and responsive pleadings filed by Far East Broadcasting Company, Incorporated ("Far East") and Trans World Radio Pacific ("Trans World").

2. The *Report and Order* provided for the use of the 7100-7300 kHz band by FCC licensed international broadcast stations in Region 3 (the Asia/Pacific area).[1] This action was designed to ease

[1] The Commission is responsible for station licensing in some of the Pacific insular areas of Region 3 - see Section 2.105 of the Commission's Rules.

frequency congestion in the bands used for international broadcasting. It offers Region 3 stations additional frequency choices and the use of these frequencies by Region 3 stations could ease congestion on the frequencies used by stations in Region 2 (the Western Hemisphere). At the same time, the Commission was concerned about the potential for interference to the Amateur Radio Service in Region 2. This led the Commission to adopt two restrictions in the rule intended to provide protection to amateur radio operations in Region 2.

3. The first precludes Commission licensed international broadcast stations in Region 3 from directing their transmissions to zones or areas of reception in Region 2. The second was intended to minimize intereference to Region 2 amateur radio operations during nighttime hours, the period during which the potential for interference is greatest. Thus, during specified hours, radiation must be reduced on pertinent azimuths. High gain antennas need a 12 db reduction below the maximum radiation in the major lobe of the antenna and lower gain antennas require a 6 dB reduction.

4. The League, in its petition for reconsideration, argues that these restrictions are not sufficient to provide appropriate interference protection. It asserts that even with the 12 dB or 6 dB reduction called for by the rule, substantial radiation still could be produced in the direction of amateur licensees in Region 2. Therefore, it asks the Commission to limit the radiation to the equivalent of that from a half-wave dipole at the same average antenna height, which in no event should exceed the level of 10dB below the radiation in the maximum lobe. It argues that such a limitation would better accomplish the protection intended by the Commission and would put international stations on notice regarding their obligation to minimize interference to the amateur service without imposing new burdens upon them. In their oppositions to the petition, Far East and Trans World argue that the League has failed to provide engineering support as to how its proposal would better protect amateurs. However they do not dispute the fact that international broadcast operations in this band have the potential for causing interference to the Amateur Radio Service in Region 2.

5. Upon reconsideration, we concur that additional protection can and should be afforded the Amateur Radio Service in Region 2 and that it can be done without placing undue burden on FCC licensed international broadcast stations. The League is correct that in certain circumstances the current rule could lead to high signal levels in Region 2, and thus we find merit in the League's

proposal to employ a half-wave dipole as a standard reference. Although radiation from the rear and other side lobes (except for the first side lobes) of typical broadcasting antennas will normally be less than that produced by a half-wave dipole antenna, radiation from the first side lobes can be substantial. Because this is not dealt with sufficiently under the current rule, a further restriction on radiation toward Region 2 is required. Therefore, we are modifying the second sentence in the footnote to Section 73.702(f) by substituting language which bases protection to Region 2 upon the maximum antenna gain permitted toward Region 2. The maximum gain toward Region 2 to be permitted is 2.15 dBi which is the equivalent gain of a half-wave dipole antenna in free space over an isotropic antenna. This is appropriate since an isotropic antenna is the reference antenna generally used for depicting the radiation patterns for international broadcast antennas. Also, a special provision is made for transmitter powers less than 100 kW. This provision permits stations using less than 100 kW transmitter power to increase gain toward Region 2 by an equivalent amount. To insure that international broadcast stations meet this standard, an additional provision is being added to the footnote in question to require the submission of sufficient antenna information to show compliance with the restriction.

6. Finally, a question was raised in the pleadings about the adequacy of the current rule in defining what was meant by orientation toward Region 2. The rule referred to any easterly direction toward Region 2, but the League thought it better to refer to radiation in any easterly direction or in any azimuth that would directly intersect any area in Region 2. However, the League's suggestion would have the effect of precluding radiation on azimuths from 0° to 180°. We do not agree that such a restriction is necessary and will maintain the language originally adopted which refers to azimuths in any easterly direction that intersect any area in Region 2.[2]

7. Accordingly, IT IS ORDERED, that the Petition for Reconsideration IS GRANTED to the extent specified above and IS DENIED in all other respects and that Section 73.702(f) of the Commission's Rules IS AMENDED, as set forth in the attached

[2] Finally, we note that the opponents understood the League to have sought a 24 hour restriction on radiation in place of the 8 hour limitation specified by the Commission. However, reference to the League filings show that concern relates to the amount of radiation to be permitted, not the extension of this provision to cover the entire 24-hour period.

appendix, effective November 21, 1985.

8. Authority for this action is contained in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

9. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

10. For further information concerning this proceeding Contact Charles H. Breig, Mass Media Bureau, (202) 254-3394.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

47 CFR 73 is amended by revising footnote 1 to Section 73.702(f) to read as follows:

§ 73.702 *Assignment and use of frequencies.*

* * * * *

(f)***

[1] Assignments in this frequency band will be limited to international broadcast stations located in the area designated as Region 3 by No. 395 of the International Radio Regulations and authorized only to transmit to zones and areas of reception situated outside Region 2 as defined in No. 394 of the International Radio Regulations. In addition, during the hours of 0800-1600 UTC (Coordinated Universal Time) antenna gain with reference to an isotropic radiator in any easterly direction that would intersect any area in Region 2 shall not exceed 2.15 dBi, except in the case where a transmitter power of less than 100 kW is used. In this case, antenna gain on restricted azimuths shall not exceed that which is determined in accordance with equation (1) below. Stations desiring to operate in this band must submit sufficient antenna performance information to ensure compliance with these restrictions.

Permitted Gain for transmitter powers less than 100 kW:

$$Gi = 2.15 + 10 \log \frac{100}{Pa} \quad \text{dBi} \qquad (1)$$

Where: Gi = maximum gain permitted with reference to an isotropic radiator,
Pa = transmitter power employed in kW.

AM-FM Relationship
AM Station Assignment Standards
Application, Not Acceptable for Filing

Former requirement, in Section 73.37(e)(1) and (e)(2), to take FM service or availability of FM channel into account in determining whether an application for a new AM station or for a major change is acceptable for filing removed. Non-technical acceptance criteria for applications for new AM stations or major changes deleted and special provisions for minority and public radio applicants in the use of U.S. Class I-A Clear Channels removed.
—*Amendment of Part 73*
MM Docket No. 85-39

FCC 85-586

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Deletion of AM Application Acceptance Criteria in Section 73.37(e) of the Commission's Rules	MM Docket No. 85-39 RM-3683
Amendment of Part 73 of the Commission's Rules, Regarding AM Station Assignment Standards and the Relationship Between the AM and FM Broadcast Services	Docket No. 18651

REPORT AND ORDER
(Proceeding terminated)

Adopted: October 31, 1985; Released: December 12, 1985

BY THE COMMISSION:

Introduction

1. We here consider our proposal in the *Notice of Proposed Rule Making* in this proceeding, (50 Fed. Reg. 8169, published

February 28, 1985), to delete the non-technical AM application acceptance criteria set forth in Section 73.37(e) of the FCC Rules.[1]

2. Under these non-technical criteria, applications for new AM stations or major changes in existing AM stations are not acceptable for filing unless:

- at least 25% of the area or population to be served has neither AM nor FM primary service; or
- the principal community to be served has fewer than two authorized local services and no FM channel is available for use there; or
- at least 20% of the area or population of the principal community receives fewer than two aural services, and no FM channel is available.

In addition, special provision was made for the acceptance of minority or noncommercial applications on the 25 U.S. I-A Clear Channels even if these applications do not meet the above requirements.

3. In issuing the *Notice*, the Commission noted that the basic policies regarding AM allocations had not been reviewed for almost 20 years. While it may well have been appropriate during early stages of AM development to employ such acceptance criteria, we noted that their continuing need is far from clear, especially in view of the substantial changes which have taken place in the intervening period. With this in mind the Commission decided on a full review of the AM application policies set forth in Section 73.37(e).

4. Most responses to the *Notice* opposed retention of existing requirements because they have limited opportunities to provide improved service, especially with respect to daytime stations seeking to obtain nighttime operation. On the other hand, minority and noncommercial radio parties sought retention of these requirements, including their special advantage with respect to the use of the 25 U.S. Class I-A channels. Based on the record in this proceeding and our extensive experience in managing the aural broadcast spectrum, we believe that retention of the requirements of section 73.37(e) is no longer warranted.

Background

5. AM radio was the first broadcast medium and, over the years, AM applications have been subject to varying acceptance

[1] Section 73.37 also contains technical acceptance criteria designed to avoid interference. These provisions are not at issue in this proceeding.

criteria. Initially, AM applications were accepted on a "demand" basis, leaving an applicant free to choose its own frequency, power, mode of operation, as well as the proposed community of license. By the early 1960's, the Commission had become concerned that this approach, which encouraged a continuing flow of applications seeking to provide service to the most populous areas of the country, could foreclose remaining opportunities to provide service to unserved and underserved areas.

6. In July 1968, the Commission instituted a "freeze" on the acceptance of AM applications to allow it to consider changes in AM allocation policies. This led to a *Notice of Proposed Rule Making* (34 Fed. Reg. 14384, September 13, 1969) in which the Commission proposed accepting applications for new AM service (other than Class IV) only if each application proposed a first aural service to 25 percent of the applicant's proposed coverage area or population. As adopted, the rule also allowed the filing of an application for a community if it lacked an available FM channel and at least 20 percent of the community did not receive two daytime city-grade services. *Report and Order,* 39 FCC 2d 645 (1973).

7. However, these rule changes proved overly restrictive. Few applicants were interested in establishing a station in those limited areas where they could file, and no opportunity was provided for them to file in those areas in which they wished to bring service. Accordingly, the Commission conducted another proceeding and decided upon a partial relaxation of the previous standards to allow, *inter alia,* expansion of daytime-only stations to provide first aural nighttime radio service in their communities. *Report and Order,* 54 FCC 2d 1 (1975). The rules were further relaxed in 1980 when the Commission, in deciding to permit additional nighttime operations on the 25 Class I-A Clear Channel stations, amended Section 73.37(e) of the Rules to allow the acceptance of applications filed by minorities and noncommercial broadcasters. *Report and Order,* 78 FCC 2d 1345 (1978), recon. denied 83 FCC 2d 216 (1980). Even though the rules have been amended on several occasions throughout the years to broaden the class of permissible applications, they remain essentially the same today as has our basic approach to AM allocations.

Discussion

8. As explained below, we believe that our AM allocation policies have been very much responsible for the mature AM radio

service that we now have in this country, and Section 73.37's non-technical acceptance criteria appear to have been instrumental in furthering our objective of increasing AM service to unserved and underserved areas. However, we have concluded that continuance of these particular criteria would no longer serve the public interest. Similarly, we have concluded that the special provisions relating to the acceptance of applications filed by minorities and public broadcasters for stations on the 25 Class I-A clear channels should no longer be retained. We shall first address the rule's present utility in bringing new AM service to unserved and underserved areas. We shall then turn our attention to the question of the exclusive preferences given minorities and non-commercial public broadcasters with respect to the use of the 25 U.S. Class I-A channels.

9. At the time of the rules' adoption, a substantial percentage of the populace was without any primary aural service. Over half the land area of the United States with an aggregate population of 25 million or more lacked any primary aural nighttime service. Although FM service had come into existence, most FM stations were in areas already well served by AM and few people then owned FM receivers.[2] Accordingly, our primary objective in fashioning these criteria was to stimulate the growth of AM stations to areas lacking any primary service.

10. Since then, the situation has dramatically changed. By 1980, the population lacking primary aural service at night in the 48 coterminous states has been reduced to under four million persons living in widely scattered areas in the West and in smaller, thinly populated portions of the East. Although precise figures are not available, it is clear that AM operations authorized since then have reduced these figures even further.[3]

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[2] According to a *Pulse* audience measurement study published in the February 23, 1970, issue of *Broadcasting*, FM penetration in Abilene, Texas, was only 25.8% and in Winston-Salem, North Carolina, was only 33.7%. Even Pittsburgh, Pennsylvania, only reached the 56.2% level. While penetration in some areas was higher, for the most part these were areas that had abundant AM service. In terms of overall market share, FM was only about 20%, a figure which had grown to 40% by 1976. Again using Pittsburgh, the FM market share in 1970 was 14.7%, climbing to no higher than 33.6% even as late as 1976. In sharp contrast, the Spring, 1985 RADAR survey by Statistical Research, Inc. estimates that FM's share of all radio listening, nationwide (7 days, 24 hours, all persons age 12+) is 70.6%.

[3] AM service continues to grow, but this growth is attributable in major part to the more extensive use of the 25 U.S. I-A Clear Channels made possible by the Commission's Clear Channel decision, *Report and Order*, 78 FCC 2d 1345 (1980), *recons. denied in pertinent part, Memorandum Opinion and Order*, 83

11. Moreover, vast changes in the FM broadcasting service, particularly in recent years, appear to have diminished the necessity of restricting remaining opportunities for new AM station growth exclusively to the areas embraced by our non-technical acceptance criteria. In spite of its slow beginnings in the 1950s and 1960s, FM has become the dominant aural medium today, and there continues to be a strong demand for FM channels in virtually all parts of the country, rural as well as urban.[4] In addition, the significant actions we have taken in Dockets 80-90 and 84-231 to increase the supply of FM channels throughout the country has expanded possibilities for new and increased radio voices in the marketplace including in underserved areas.

12. Because the availability of FM stations to provide service to new areas appears to be considerably more elastic than that on the AM side, FM appears to be in a far better position than AM to respond to the need for new service in the remaining unserved areas. In addition, FM has the technological advantage over AM of not generating nighttime skywave propagation, which is responsible for greater limitations on nighttime operation of AM broadcasting. The absence of this limitation in FM and the near universal availability of FM receivers in homes and cars have already been instrumental factors that have paved the way in bringing FM service to many areas lacking AM service and, in our estimation, augurs still further for the availability of FM service in many new communities and areas.

13. Given all these circumstances and especially the fact that the demand for FM service is currently much stronger than for AM, we cannot envision any continued strong demand for AM service in the remaining areas now subject to the acceptance criteria. At this juncture, virtually all of the unserved or underserved areas that remain lack a population center capable of supporting a high power AM station which in turn is capable of reaching the area needing service. Moreover, even though we have made provision for additional AM stations with powers up to 50 kW, we have found that this opportunity has been little utilized as a vehicle to provide service in remaining areas, nor has it

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FCC 2d 216 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F. 2d 1222 (D.C. Cir. 1982).

[4] The significant progress FM broadcasting has made throughout the years and the dominance it has achieved are principal factors which obviously point to no further need for these restrictions from the standpoint of our having to encourage commercial FM development, one of the early objectives underlying the criteria.

proved to be a realistic means of providing service to a significant number of persons, particularly at night.

14. Accordingly, we have come to the conclusion that retention of the non-technical acceptance criteria for the very few remaining areas that, in theory, might be desirable locations for new AM services but, in economic reality, could not support such services would serve no positive public interest purpose. Although universal service is a laudatory goal, it is clear to us that future growth in AM is unlikely to bring service to unserved areas even if the current requirements are maintained. From an economic standpoint, it simply is not possible to guarantee one local service to every community regardless of size.[5] In areas where there is both demand and ability to support a broadcast operation, AM service, for the most part, has already been proposed. And, in those areas where future service expansion is possible, the likelihood of its being provided by FM, rather than by AM, is strong. Given these circumstances and the fact that the rule's purposes have largely been achieved, there appears to be very little wisdom in our rigid adherence to the non-technical criteria of Section 73.37(e) if they merely serve in theory to preserve AM "opportunities" in the remaining unserved and unserved areas.

15. Aside from the minimal public benefits to be gained from their retention, we find that continuance of these restrictions would have undesirable negative effects. While it is apparent that the remaining benefits that can be reaped under the rule are likely to be negligible, retention of the rule may have the practical effect of eliminating opportunities for new, additional AM radio voices elsewhere. The exclusion of otherwise acceptable applications occasioned by the non-technical criteria thus may unjustly deny to the public new prospects for additional diversity outside those limited areas expressly carved out under the rule.

16. The rule is also designed to foster a first and second local transmission service as well. However, it should be clear that two local services will not always be sufficient to repond to the needs of a community. Yet, the practical effect of the current provisions is to exclude otherwise acceptable proposals that do not offer a first or second local service. Because they limit entry of new radio forces into the marketplace, they necessarily limit prospects for increased program competition and program diversity. At this relatively mature stage of AM's development, we think it is more sensible to rely on actual demand as a basis for permitting AM

[5] *Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in Docket No 19161 Anamosa, Iowa *et al.* 46 FCC 2d 520 at 525 (1974).

operation, rather than to maintain the current criteria.

17. Moreover, we believe that the approach we are adopting today comports more fully with Section 307(b) of the Act. Although that section calls for a "fair, efficient and equitable" distribution of radio facilities, it indicates quite clearly that the "equitable distribution" mentioned is to be considered "insofar as there is demand for the same." Accordingly, we believe that the purposes of Section 307(b) are far better served by allowing the filing of applications for which there is demand rather than letting them "lie fallow."[6]

18. There are other considerations which lead us to this conclusion. For many daytime-only stations, the only way to obtain nighttime operation is by proposing a change in station location to a community meeting the Section 73.37(e) standard, *viz.*, a suburban community. In some of these instances, no attempt is made to determine whether there is a greater need for the station in the suburban location to which it was being moved. In this repect, these non-technical criteria serve only as superficial barriers since some daytime operators having the necessary resources and wherewithal are capable of clearing the administrative hurdles created by the rule. However, other daytime-only stations are not able to take advantage of the provisions of the rules at all and to them it operates as an absolute barrier by foreclosing to them any opportunities for expanding to nighttime operations.

19. The effects of these barriers run counter to the Commission's efforts to alleviate the difficulties daytime-only AM stations face because of their hours of operation. Even with the actions we have taken thus far, daytime-only stations still operate under a disability, unable to compete effectively and to offer the benefits that unlimited operation would bring to their audience. Removal of these barriers creates the possibility of new opportunities for a number of these stations to obtain nighttime operation without having to propose a change in station location solely to

[6] The policy judgment that new AM stations should be allowed wherever there is sufficient demand to support them assumes, of course, that, absent the non-technical criteria, new AM stations can be proposed for areas already well served without violating our interference rules. In *Report and Order, MM Docket No. 84-281,* 50 Fed. Reg. 24515 (June 11, 1985), *appeal pending sub nom. National Black Media Coalition v. FCC,* Case No. 85-4121 (2d Cir.), we found that this possibility did not exist on the foreign clear channels, where for the most part new full-time stations could only be proposed in unserved and underserved areas. Proposals for new stations in areas already adequately served would generally run afoul of our interference rules.

clear administrative hurdles.[7]

20. We also wish to emphasize that the burdens that would be removed by elimination of the threshold showing requirements of Section 73.37(e)(1) and (2)(i)-(iii) would equally be lifted from the shoulders of minority applicants as well. This would mean, for example, that a minority applicant for a new station on a channel, other than a domestic clear channel, will no longer have to make the threshold showing of service to unserved or underserved areas in order to have its application accepted for filing. Deletion of these provisions would therefore have a positive effect on increasing opportunities for minority ownership of AM stations because it would open the door wider to the possibility of a larger number of new AM stations for which authorization could be sought.

21. Having concluded that the benefits underlying the rule of extending new AM service to unserved and underserved area are so small as to be outweighed by the detriments imposed, we now turn to the final issue for our consideration—whether to maintain the special provisions applicable to minorities and noncommercial broadcast entities in the use of the 25 U.S. Class I-A Clear Channels (Section 73.37(e)(2)(iv) and (v). The National Black Media Coalition (NBMC) and the National Association of Black Owned Broadcasters (NABOB) are opposed to the elimination of these special provisions relating to minorities. They urge retention of these provisions as a means for increasing the number of minority-owned stations. They rely on reports that the number of minority-owned broadcast stations in 1984 was reportedly 188 or 1.8% of all broadcasting stations, and that this figure was even below the 1980 figure of 196 minority-owned stations representing 1.9% of the total. They also point out that, until recently, only 13 authorizations have been issued to minority applicants in reliance on the minority-ownership exception in Section 73.37(e)(2)(iv). NABOB asserts that the temporary imposition of a "freeze" on the use of these Clear Channels and the time required for judicial review of the rules themselves have inhibited filings and thus form a basis for an additional period during which the rule should continue in effect. For these reasons, we are asked to leave in

[7] Some licensees may still wish to change their community of license. No alteration in the policies in regard to these applications is intended, including proposals for change of community of license made possible by our revision of Section 73.37(e).

place all of the non-technical acceptance criteria of Section 73.37(e).

22. Under the current criteria, applicants other than minorities and non-commercial entities have never been foreclosed from applying for operation on the 25 U.S. Class I-A Clear Channels, although, unlike minorities and non-commercial entities, they were permitted to apply only for stations serving unserved and underserved areas. However, if we eliminate the non-technical acceptance criteria for unserved and underserved areas, and still maintain the minority and noncommercial broadcast criteria, no one except minorities and non-commercial broadcasters could apply for operation on these channels. In light of this outcome, we can understand why NABOB seeks preservation of the non-technical acceptance criteria and, apparently, not merely the minority provisions: minorities and non-commercial entities would have the exclusive right to apply for all of the remaining opportunities for use of the 25 Class I-A Clear Channels. Such a result clearly was never contemplated by our rules[8] and, having already determined that the non-technical acceptance criteria for underserved areas should be eliminated, we decline to adopt that result here. Accordingly, we conclude that the special provisions for minorities and non-commercial stations should also be deleted.

23. Moreover, even if we were disposed to retain the special provisions of Section 73.37(e)(2)(iv), we are extremely skeptical whether the few remaining opportunities that exist would justify their retention. The Commission has already received over three hundred applications for unlimited-time Class II stations on the Class I-A channels in question and, therefore, it is extremely unlikely that many more requests for authorizations beyond those already requested could be entertained whether filed by minorities or others. This, together with the fact that approximately 115 stations have already been authorized by the Commission to operate on these channels, indicates that, due to increased spectrum crowding, it simply would not be possible to accommodate many more authorizations in this area.[9] Because there are so few remaining possibilities for unlimited-time stations on these clear channels and because only in unusual circumstances would additional growth in this area be possible, perpetuation of the

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[8] *Clear Channel Broadcasting Report and Order, supra.*

[9] The "freeze" mentioned by NABOB may have discouraged the filing of some applications by minorities for use of these Clear Channels, but the fact that the Commission received over three hundred applications suggests that the impact of the freeze was minimal. In any event, no Commission rule or policy prevented the filing of applications either before or after the freeze.

special provisions of Section 73.37(e)(2)(iv) cannot be viewed as a realistic means of appreciably increasing the number of minority owned stations or as a justifiable means for further enlarging the number of minority-owned stations.[10]

24. For similar reasons, we have also concluded that the special provision of Section 73.37(e)(2)(v) relating to the use of these Clear Channels by noncommercial broadcasters should be deleted. Although Congress has stated that "it is in the public interest to encourage the growth and development of public radio," 47 U.S.C. § 396(a)(1), that declaration does not require adoption of, or adherence to, any allocations policy which limits all remaining AM opportunities exclusively to noncommercial broadcasters. We believe that the aims of the statute can be better met through other regulatory mechanisms that do not have the drastic effect of foreclosing remaining AM opportunities to others. Moreover, as indicated above, even with the deletion of the non-technical acceptance criteria, noncommercial broadcasters would continue to have the opportunity to apply for use of these Clear Channels to the extent any opportunities exist. In addition, elimination of the non-technical acceptance criteria would afford noncommercial broadcasters the opportunity to seek authorizations for new AM service on other frequencies in those areas previously forbidden to them and others under the rule.

25. Our decision to delete the exclusivity elements contained in Section 73.37(e)(2)(iv) & (v) does not curtail in any manner the filing opportunities created under the rule for minorities and noncommercial broadcasters.[12] It merely removes the existing shield which, in some circumstances, protected these groups from the filing of competing applications by others. But even without this shield, minority groups would still continue to enjoy in any ensuing comparative license proceeding the benefits of a preference or enhancement factor to the extent that there existed integration of minority ownership into the overall management of the station. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982), *aff'd sub. nom. West Michigan Broadcasting Co. v. FCC,*

[10] Our reasoning that "so few remaining" opportunities exist to justify our retention of the special acceptance provision for minorities and noncommercial broadcasters was also a consideration at the heart of our decision not to apply for the first tie these special acceptance provisions in the foreign clear channel proceeding. *See* n. 7 *supra.* Although our action in that proceeding created some opportunity for new-full-time stations on the 14 foreign clear channels, it created few, if any, opportunities for full-time stations *outside of* unserved or underserved areas.

735 F. 2d 601 (1984), *cert. denied,* 105 S.Ct. 1392 (1985).

26. We believe that a sounder approach to promoting minority ownership is to develop regulatory tools which facilitate new opportunities for minorities, but which do not have the exclusive effect of denying opportunities to all others completely, which retention of the special minority provision of Section 73.37(e)(2)(iv) would have. For example, we have attempted to alleviate the underrepresentation of minority ownership that exists through such regulatory mechanisms as the distress sale policy, issuance of tax certificates, and effectuation of the newly-enacted lottery statute by Congress. *See, e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 FCC 2d 979 (1978); *Minority Ownership of Broadcast Facilities,* 69 FCC 2d 1591 (1978); *Random Selection Lotteries, Second Report and Order,* 93 FCC 2d 952 (1983), *appeal pending sub nom. National Latino Media Coalition v. FCC,* No. 83-1785 (D.C. Cir. July 26, 1983). Very recently, we instituted a *Notice of Inquiry* seeking comment on the possibility of extending the existing distress sale policy to permit a distress sale by a licensee even after the licensee has been designated for hearing. *Notice of Inquiry in the Matter of Distress Sale Policy for Broadcast Licensees (MM Docket No. 85-299),* FCC 85-543 (adopted October 8, 1985). In our estimation, all these measures serve to promote minority ownership of broadcast stations for the purpose of fostering program diversity.

27. *Other Matters.* Several Parties in their comments asked that we amend other sections of the rules. The Association of Federal Communications Consulting Engineers and du Treil-Rackley, Consulting Engineers, ask that we modify Section 73.37(b)(1), relating to prohibited overlap of adjacent channel signals. WEW, Inc. requests that we amend Sections 24(i) and (j), relating to requirements affecting Class II-A stations and the mimimum signal to be provided over principal cities. These matters are all outside the scope of the present proceeding, which is limited to the proposal set out in the *Notice of Proposed Rule Making,* to eliminate the non-technical AM acceptance criteria in Sections 73.37(e).

28. The amendment contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention require-

ments and will not increase or decrease burden hours imposed on the public.

REGULATORY FLEXIBILITY FINAL ANALYSIS

I. Reason for Action

The amendment is designed to relieve restrictions on the filing of AM applications.

II. Objective

By relaxing current restrictions on the filing of AM applications, service can be increased and opportunities for competition enhanced.

III. Legal Basis

Section 303 and 307(b) of the Communications Act of 1934, as amended, empower the Commission to foster more efficient use of radio spectrum in the public interest.

IV. Description, Potential Impact and Number of Small Entities Affected

The National Black Media Coalition took issue with the observation in the Regulatory Flexibility Initial Analysis that the only group of small entities affected is the group of potential applicants who will be able to file for new or improved facilities. NBMC asserted that minority applicants also would be affected because they no longer would receive special treatment on the U.S. Class I-A Clear Channels. However, as discussed above, the rule is unlikely to offer significant future benefits to such applicants. In addition, their opportunity to file otherwise acceptable applications has not been diminished. Accordingly, we adhere to the view set out in the Initial Analysis that only potential applicants for new and improved AM facilities will be significantly affected by the present Rule change. They will be favorably affected.

V. Federal Rules which Overlap, Duplicate, or Conflict with Stated Objectives

None.

VI. Any Significant Alternative Minimizing Impact on Any Entities Consistent with Stated Objectives

Although NBMC, differed with the Commission's initial analysis that no adverse impact on small entities is expected, it offered no alternative consistent with the stated objectives.

29. Accordingly, pursuant to authority found in Sections 303 and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That, effective January 21, 1986, Section 73.37 of the Commission's Rules IS AMENDED as set forth in appendix 1.

30. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

31. For further information please contact Louis C. Stephens of the Commission's Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix 1

1. 47 C.F.R. Part 73 Section 73.37 is amended by revising paragraph (e) to read as follows:

§ *73.37 Applications for broadcast facilities, showing required*

* * * * *

(e) In addition to a demonstration of compliance with the requirements of paragraph (a), and, as appropriate, paragraphs (b), (c) and (d) of this section, an application for a new AM broadcast station, or for a major change (see § 73.3571(a)(1) of this chapter) in an authorized AM broadcast station, as a condition for its acceptance, shall make a satisfactory showing, if new or modified nighttime operation by a Class II or Class III station is proposed, that objectionable interference will not result to any authorized station, as determined pursuant to § 73.182(o) of this chapter.

* * * * *

2. 47 C.F.R. Part 73 Section 73.37 is amended by deleting Notes 5, 6, 7 and 10 and by renumbering existing Notes 8 and 9 as Notes 5 and 6, respectively.

Appendix 2

Parties Who Commented on the Record of MM Docket No. 85-39

Association of Federal Communications Consulting Engineers (AFCCE)
Corporation for Public Broadcasting (CPB)

Du Treil-Rackly, Consulting Engineers
First Broadcasting of Nevada, Inc. and Dave Mack Broadcasting (joint filing)
Robert A. Jones Consulting Engineers
National Black Media Coalition (NBMC)
National Association of Black Owned Broadcasters, Inc. (NABOB)
National Association of Broadcasters (NAB)
National Radio Broadcasters Association (NRBA)
National Public Radio (NPR)
Radio WEW, Inc. (WEW)

CATV EEO Policy
CATV, Equal Employment Requirements
Discrimination, Affirmative Action Program
Employment Discrimination
Reports, Required to be Filed

Commission instituted new rules and requirements for cable entities regarding equal employment opportunities (EEO) based on EEO policy reflected in Cable Communications Policy Act of 1984 (Cable Act). These rules set forth policies and practices to ensure non-discrimination in employment in the cable industry. Further, Commission adopted filing requirements for purpose of certifying and investigating EEO compliance as required by the Cable Act.
—*Amendment of Part 76*
MM Docket No. 85-61

FCC 85-511

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984	MM Docket No. 85-61

REPORT AND ORDER

Adopted: September 18, 1985; Released: September 25, 1985

BY THE COMMISSION: COMMISSIONER PATRICK DISSENTING IN PART AND ISSUING A STATEMENT.

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I. INTRODUCTION

1. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act) was signed into law.[1] This legislation established guidelines for the regulation of cable systems in the areas of ownership, channel usage, franchising, rates and service regulations and equal employment opportunity (EEO) requirements.[2] By this *Report and Order*, the Commission is amending its rules to implement the EEO provisions of the Cable Act.

II. BACKGROUND

2. On March 1, 1985, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) that proposed rules and regulations to implement the equal employment opportunity provisions of the Cable Act. Section 634 of the Cable Act sets forth EEO requirements for the cable industry. This section of the Cable Act

[1] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1 *et seq.*, 98 Stat. 2779 (1984).

[2] The Commission implemented certain provisions of the Cable Act other than those pertaining to equal employment opportunity in the *Report and Order* in MM Docket 84-1296, 50 FR 18637 (1985).

requires that each cable operator establish a program to ensure equal employment opportunities. In addition, it states that cable operators must file an annual employment report with the Commission and defines the contents of that report. Section 634 of the Cable Act also provides that the Commission must certify annually those cable systems that are in compliance with these EEO provisions and, must periodically investigate the employment practices of each cable system to review and verify its compliance with the prescribed EEO standards.

3. Section 634(d)(1) of the Cable Act requires that the Commission, not later than 270 days after the effective date of the Cable Act, and after notice and opportunity for hearing, prescribe rules to ensure that the cable industry carries out these EEO provisions.[3] In the *Notice*, we proposed rule changes we believed were required to implement the EEO provisions of the Cable Act and sought comment from all interested parties on the proposed rules.

4. Seventeen comments and eleven reply comments were filed in response to the *Notice*.[4]

III. CURRENT STATE OF THE CABLE INDUSTRY

5. The Commission has broad experience in the enforcement of EEO standards in the cable industry. The Commission first adopted EEO requirements for the cable industry in 1972.[5] These rules were subsequently modified in 1978.[6] The cable EEO rules currently require all operators of cable television systems to afford equal opportunity in employment to all qualified persons. Cable operators may not discriminate against any person in employment because of race, color, religion, national origin or sex. In addition, each cable operator must establish and file with the Commission an equal employment opportunity program which includes specific practices designed to assure equal opportunity in employment. Finally, cable operators are required to file an annual employment report with the Commission.

6. The cable industry has generally increased the number of minority and female employees since the adoption of the Commission's EEO rules and regulations. The following tables show the

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[3] Appendix A contains the rule changes we are adopting to implement the Cable Act.

[4] Appendix B is a list of commenters.

[5] *See Report and Order*, Docket No. 19246, 34 FCC 2d 186 (1972).

[6] *See Report and Order* in Docket 20829, 69 FCC 2d 1324 (1978).

minority and female employment statistics for the cable industry over the last ten years:

Overall Employment in the Cable Industry[7]

	1975	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*1982*	*1983*	*1984*
% of Minority Employees	8.6	9.3	10.9	11.7	12.3	12.8	13.9	15.2	15.2	17.4
% of Female Employees	28.4	30.0	29.1	29.6	32.0	32.4	33.3	34.7	36.0	37.2

Employment in Top Four Job Categories[8]

	1975	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*1982*	*1983*	*1984*
% of Minority Employees	N/A	N/A	N/A	10.3	10.6	10.4	11.0	12.7	12.6	14.0
% of Female Employees	N/A	N/A	N/A	10.8	12.6	13.9	16.5	18.4	19.4	21.5

7. Several commenting parties point to the present composition of the cable industry as an indication of the general non-discriminatory nature of the cable industry's current employment practices. The National Cable Television Association, Inc. (NCTA), in its comments, states that the cable industry has nearly doubled its percentage of minority employees since 1975. Over the same period, NCTA notes that the percentage of female employees has grown by almost one-third. NCTA also indicates that the cable industry has significantly increased the percentage of minorities and women in the top four job categories. The Joint Comments of Cable Companies (Joint Commenters) indicate that since 1974 minority employment in the top four job categories has more than doubled. The Joint Commenters believe that such statistics demonstrate the non-discriminatory nature of cable industry employment practices and the effectiveness of the Commission's rules in promoting such practices. Similar observations were made by other commenters.

IV. SCOPE, POLICY AND PROGRAM

8. Section 634 of the Cable Act states that equal opportunity in employment shall be afforded by entities operating cable systems

[7] Source: FCC Public Notices concerning Cable Television Employment Statistics. These figures do not include headquarters personnel.

[8] *Id.*

and that no person shall be discriminated against in employment because of race, color, religion, national origin, age, or sex. In addition, it sets forth a number of provisions to ensure opportunity for equal employment in the cable industry.[9] In this regard, it defines the scope of applicability of the EEO rules and, delineates the policy, program and practices that cable entities must establish to ensure equal employment opportunity.

9. *Scope of EEO Rules.* Section 634(a) of the Cable Act defines the cable entities subject to the EEO provisions. It states that these provisions:

> shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system.

In addition, Section 634(h) broadens the scope of systems subject to the EEO provisions. This section provides that the EEO requirements also apply to operators of satellite master antenna television systems (SMATVs), including those systems that serve only to retransmit the signals of broadcast television stations.[10] Section 634(h) also provides that a SMATV operator is not subject to the EEO requirements if it serves fewer than 50 subscribers. The House Report on the Cable Act indicates that SMATV operators are subject to the EEO provisions regardless of whether the systems only serve commonly-owned apartments without crossing public rights of way.[11]

10. The House Report indicates that Section 634 applies to cable "entities," rather than cable "operators," that manage or operate cable systems pursuant to any existing or future franchises.[12] The House Report also emphasizes that both individual cable systems and the regional and national headquarters of a company, to the extent such operations are primarily engaged in

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[9] Our EEO authority does not preclude states and franchising authorities from requiring EEO standards that are consistent with the requirements of Section 634. *See* Section 634(i)(1)(A). Regarding state and local authority to adopt more stringent EEO standards, we concur with the Department of Justice's comments that the Commission misstated the intent of the Cable Act in the *Notice* because of our reliance on the legislative history of an earlier version of the statute. *See Notice* at fn. 4.

[10] Section 634(h) states that "the term 'cable operator' includes any operator of any satellite master antenna television system, including a system described in Section 602(6)(A)." Section 602(6)(A) refers to "a facility that serves only to retransmit the television signals of one or more television broadcast stations."

[11] *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (hereinafter House Report) at 93.

[12] *Id.* at 86.

the management of any cable system, are subject to the provisions of this section. It states:

> where a subsidiary or affiliate of a corporation or other entity has primary responsibility for the management or operation of one or more cable systems, the affiliate or subsidiary, and the cable system it manages or operates, will be subject to the requirements of this section as separate employment units; the parent entity will not be subject to the requirements of this section. Similarly, other affiliates or subsidiaries of the parent entity, if not engaged primarily in the management or operation of any cable system, also will not be subject to the requirements of this section.[13]

11. In the *Notice*, the Commission observed that the scope of the EEO requirements of the Cable Act differs in certain respects from that of the Commission's EEO rules. First, the requirements of the statute apply to entities involved in management or operation of cable television systems, while our EEO rules apply to "operators" of such systems. In the *Notice*, the Commission stated its belief that this difference constitutes a minor change in terminology with no substantive effect. However, for purposes of consistency, we proposed to amend our rules to comport with the language in the Cable Act. In addition, Section 634 specifies a broader range of video distribution systems as "cable systems" for purposes of EEO enforcement than our current rules.[14] We proposed to modify our rules concerning the scope of systems subject to EEO enforcement so that they conform with the statute.

12. No specific comments were received concerning our proposals with regard to the scope of the EEO provisions of the Cable Act. However, the Office of Management and Budget (OMB), in its response to our request for approval of the EEO reporting requirements, is critical of the proposed scope of these requirements. OMB questions whether Section 634 requires SMATV operators to file statistical reports. It recognizes that Section 634 includes operators of SMATV systems as "cable operators" and that some portions of the section apply specifically to cable operators. Notwithstanding this, OMB argues that the portion requiring an annual statistical report does not refer to cable operators, but rather to the cable "entities" described in Section 634(a). OMB, therefore, holds that the statute does not require

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[13] *Id.*

[14] We also noted that the definition of a cable television system in our rules differs from that described in the statute. In the *Report and Order* implementing other provisions of the Cable Act, the Commission adopted the Cable Act definition of a cable system. *See Report and Order*, Docket No. 84-1296, *supra.*

SMATV operators to file statistical EEO reports.

13. After reviewing the record, we believe the modifications proposed in the *Notice* concerning the scope of systems subject to the EEO requirements are generally appropriate to conform our rules with Section 634. We disagree with OMB's interpretation that the Cable Act does not require SMATV operators to file statistical EEO reports. We do not believe that the fact that the statute refers to operators of SMATV systems as "cable operators" rather than "cable entities" exempts operators of SMATV systems from the statistical reporting requirements. Section 634(a) of the Cable Act specifies that the EEO requirements shall apply to "any corporation, ..., or trust engaged primarily in the *operation of any cable system* (emphasis added)." Further, Section 634(i)(3) provides that "the provisions of this section shall apply to any cable operator . . . . " and that "cable operator" includes a SMATV operator. Based on this language, we believe that Congress intended that SMATV operators be subject to all provisions of Section 634. Accordingly, we will require SMATV operators to comply with the cable EEO statistical reporting requirements. It should be noted, however, that Section 634(h)(3) provides that where the cable operator is also the owner of a multiple unit dwelling, the EEO requirements will only apply with respect to its employees who are primarily engaged in cable telecommunications. We believe that in most cases, SMATV operators will have fewer than six employees who are involved in the operation of the cable service on a full-time basis and, therefore, it would appear that most SMATV operators would be exempt from the filing requirement.

14. *EEO Policy.* Section 634(b) of the Cable Act requires that each cable entity afford equal opportunity in employment. This section, thus, sets the general policy that cable entities are prohibited from discriminating on the basis of race, color, religion, national origin, age, or sex. Section 634(c) of the Cable Act requires that each cable entity establish, maintain and execute a continuing program of specific practices to ensure equal employment opportunity in every aspect of its employment policies. The Cable Act sets forth the following five steps each entity shall take as part of its EEO program:

(1) Define and review the responsibility of each level of management with regard to the application and enforcement of its EEO policy;

(2) Inform its employees and recognized employee organizations of the EEO policy;

(3) Solicit the assistance of sources of qualified applicants, without regard to race, color, religion, national origin, age, or sex, to fulfill its employment needs;

(4) Conduct a continuing program to exclude discrimination on the basis of race, color, religion, national origin, age, or sex in its personnel practices and working conditions; and

(5) Continually review its job structure and employment practices to ensure genuine equality of opportunity at all levels.

These provisions are similar to the requirements of Section 76.311(e) of the Commission's rules with the exception that the Cable Act adds a specific prohibition against age discrimination. In the *Notice*, we proposed to add the age category and to change the language of our rules to conform with the Cable Act.

15. Commenting parties generally support our proposal to amend our rules to add a prohibition on age discrimination and to conform the language of the rules to the statute. Accordingly, we are amending Section 76.311 of the rules to conform to Section 634(c) of the Cable Act, as proposed in the *Notice*. These provisions appear in a new rule section 76.73 as shown in the attached Appendix A.

16. *EEO Program.* Section 634(d)(2) directs the Commission to promulgate rules that specify the manner in which each cable entity shall, to the extent possible:

(1) Disseminate its equal opportunity program to job applicants, employees, and those with whom it regularly does business;

(2) Use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation;

(3) Evaluate its employment profile and job turnover against the availability of minorities and women in its franchise area;

(4) Undertake to offer promotions of minorities and women to positions of greater responsibility;

(5) Encourage minority and female entrepreneurs to conduct business with all parts of its operation; and

(6) Analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program.

17. The legislative history indicates that this subsection conforms in large part to the existing EEO program requirements contained in Section 76.311(f) of the rules. For example, these

rules state that each cable entity must disseminate its equal opportunity program by posting notices in its offices and places of employment informing employees, and applicants for employment, of their equal employment opportunity rights. This section of the Cable Act adds, however, a requirement that the Commission design rules to encourage cable systems to conduct business with minority and women entrepreneurs. In the *Notice*, we indicated that we believe this can be accomplished by requiring cable entities, to the extent possible, to affirmatively seek bids from minority and female entrepreneurs for contracted work.

18. The commenting parties generaly agree with our proposed approach for revising our rules concerning the requirements of a cable system's EEO program. In particular, most parties are in favor of our proposal to encourage cable systems to conduct business with minority and female entrepreneurs. Accordingly, we are amending our rules to incorporate the provisions of Section 634(d)(2) as proposed in the *Notice*.

V. MONITORING OF EEO PERFORMANCE

19. Section 634 of the Cable Act requires that the Commission monitor the EEO performance of cable entities. The statute requires that all entities with more than five full-time employees file an annual employment report with the Commission. Furthermore, the Commission is required to certify annually that each cable entity is in compliance with the EEO standards prescribed in paragraphs (b), (c) and (d) of Section 634. This certification is to be based on information in the possession of the Commission, including the annual reports. The Commission also must investigate each cable entity at least once in five years to review its employment policies and practices and to verify the accuracy of its annual employment reports.

20. In the *Notice*, the Commission proposed a comprehensive revision of its EEO reporting requirements and compliance procedures to reflect the provisions of Section 634 of the Cable Act. The Commission proposed to delete the rule requiring each cable operator to file a copy of its EEO program and to replace it with a new procedure for certifying compliance with our EEO requirements. The new certification and investigation procedures would be based on information submitted on a revised Form 395A, "Cable Television Annual Employment Report and Application for Certification," and a new Form 397, "Cable Television

Equal Employment Opportunity Investigation Form."[15] As proposed, Form 395A would satisfy the Cable Act's annual reporting requirement and provide the Commission with sufficient additional information for certification. The Commission made specific proposals for certification based on these reports, including the use of the existing EEO processing guidelines. The proposed new Form 397 would elicit more detailed information and would be submitted once every five years, in lieu of the Form 395A. The Form 397 reports would be the basis of the Commission's investigation of cable systems' EEO performance. The Commission also proposed to allow arrangements with multiple system operators (MSOs) for the coordinated review of their EEO reports.

21. In developing proposals for the reporting formats and the certification and investigation procedures, we considered several criteria. First, the reporting requirement must provide the Commission with sufficient information to enable us to implement fully our statutory EEO enforcement responsibilities. Second, we attempted to minimize the reporting burden on individual cable operators. Finally, in order to process the required data from more than 5,000 employment units every year, we sought procedures that would be feasible for us to administer and would allow us to automate much of our review of cable system EEO performance.

A. Annual Employment Reports

22. Section 634(d)(3) of the Cable Act requires that each cable entity with more than five full-time employees file an annual employment report that identifies full-time and part-time employees by race and sex in each of the following job categories:

(A) officials and managers;

(B) professionals;

(C) technicians;

(D) sales persons;

(E) office and clerical personnel'

(F) skilled craft persons;

(G) semiskilled operatives;

(H) unskilled laborers; and

[15] *See Notice*, Appendices B and C.

(I) service workers.[16]

This reporting requirement is similar to the Commission's existing Form 395A. The Cable Act also requires that the annual report include the number of minorities and women in the relevant labor market for each of the specified job categories. The Cable Act further specifies that the reports shall be available at the central office and at every location where more than five full-time employees are assigned to work.

23. Upon review of the record in this proceding, we have developed revised annual EEO reporting requirements that we believe will provide adequate information for our certification activity with the minimum burden on all parties involved. The various aspects of the revised EEO annual reporting requirement are discussed below.

24. *Filing Requirements.* As proposed in the *Notice*, each employment unit and headquarters unit with more than five full-time employees would submit a revised Form 395A each year. This form would request identifying information about the cable employment unit (name, address, etc.); a breakdown of full-time employees by sex, race and national origin in the nine job categories specified in Section 634 of the Cable Act; data on part-time employees, promotions and job hires in the upper four job categories and in the aggregate; and, a list of primary minority and female recruitment sources contacted. In addition, the form would request available labor force data (aggregate) and, if available, occupational availability data in each of the nine job categories and in the aggregate. The employment information on the form would be based on one payroll period in January, February or March of the year during which the report is filed. Each employment unit would be expected to use the same payroll period each year. We also proposed to require employment units with five or fewer full-time employees to submit page one of the form which contains various identifying information. This information would allow us to keep consistent records, especially for cable entities that may meet the reporting cut-off in some years, but do not meet it in other years.[17]

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[16] These job categories are determined by the Office of Management and Budget and are presently used by the Commission for its EEO reporting requirements. These categories are also used government-wide for all industries. *See Notice* Appendix B for complete definitions of these terms.

[17] This is our existing procedure for systems with fewer than five employees.

25. Several parties had general comments relating to these proposals. OMB questions the need to collect this information from those cable entities that also are required to submit similar data to the Equal Employment Opportunity Commission (EEOC) on its Form EEO-1. Centel Cable Television (Centel), which must also file with the EEOC, suggests that we incorporate that agency's filing into our forms, as much as possible, to minimize the reporting burden on the affected cable entities. OMB states that the proposed Form 395A and its instructions do not state why the data are being collected. OMB states that Section 3504(a)(3)(C) of the Paperwork Reduction Act requires that the Commission indicate how the requested data will be used and whether a response to the form is voluntary, required to obtain a benefit or mandated by law. NCTA and the National Association of Minorities in Cable (NAMIC) support our proposal to require all employment units to file page one of the form to facilitate our recordkeeping. OMB, however, objects to this proposal, stating that we already collect identifying information from each cable system on the annual Form 325. As an alternative, OMB suggests the addition of a certification statement to Form 325 to the effect that the cable entity has less than six employees and is not required to submit an annual employment report.

26. The Office of Communication of the United Church of Christ and Action for Children's Television (UCC/ACT) and OMB request that we clarify the date that the annual report is due at the Commission. UCC/ACT notes that the proposed instructions indicate that Form 395A must be submitted by May 1 and the proposed form requires a response within 60 days of receipt. The Joint Commenters recommend that the Commission permit an employment unit to change its reporting period if there is a change of ownership.

27. The Form 395A reports will be required to be submitted by May 1 of each year. After consideration of these comments, we are adopting filing requirements that include some modifications of our initial proposals. We will require each cable employment unit with six or more full-time employees to submit Form 395A annually. The statistical information contained on the Form 395A should be based on one pay period during January, February, or March, as proposed in the *Notice*.[18]

[18] These provisions apply to cable entities as employment units. Each cable system may be considered a separate employment unit. However, where two or more cable systems are under common ownership or control and are interrelated in their local management, operation and utilization of employees, they

28. We will not, in general, require an annual submission from cable entities with fewer than six full-time employees. However, we will require such entities to initially identify that they have less than six employees and are not subject to the statistical reporting requirements. This information would be provided by a one-time certification on page one of the Form 395A that the unit has fewer than six full-time employees.[19] Of course, if such a cable entity increased its workforce to six or more full-time employees, it would then become subject to the full Form 395A reporting requirements. On the other hand, if a cable entity reduces its workforce to fewer than six full-time employees, it would be subject only to the page one identification requirement.

29. We believe that these reporting requirements are appropriate under the provisions of the Cable Act. In addition, we believe that this approach will satisfy our administrative need for information to determine which cable entities are required to file reports while minimizing the impact of our efforts to obtain this information on cable entities with fewer than six full-time employees.

30. In view of OMB's request, we are adding a statement to the revised Form 395A to inform the respondent that the information requested is for the purpose of determining compliance with Sections 634(b), (c) and (d) of the Communications Act and that a response is mandatory.

31. *Employment Data.* In the *Notice*, we proposed to continue to use the existing format for reporting the number of full-time employees by job category on Form 395A. Commenters generally favored our approach for collecting the required annual employment data. For example, NCTA states that the proposed form is already familiar to the Commission and the industry, is consistent with the statute, and is an appropriate tool for gathering information concerning EEO performance. However, NCTA suggests reversing the order of the headings for race, sex and national origin classifications to conform to EEOC's EEO-1 form

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shall constitute a single employment unit. A multiple system operator shall treat as a separate employment unit each headquarters office to the extent the work of that office is primarily related to the operation of more than one employment unit.

[19] In the first year of the implementation of the EEO reporting requirements, we will send a copy of the new Form 395A to all cable entities that are presently required to file annual employment reports. All cable units will be required to submit either a full report or page one of Form 395A, certifying that they have fewer than six full-time employees. After this, only those entities with six or more full-time employees or those entities that filed a full report the previous year will be subject to a reporting requirement.

that is required from cable entities with more than 100 employees. OMB asserts that the Commission's proposal goes beyond the statute. Since the statute only requires that employees be classified by race and sex, OMB states that we should exclude all requests for information regarding ethnic background (*e.g.*, Hispanic). American Women in Radio and Television (AWRT) requests that we define the word "full-time," especially as it might effect sales representatives whose work hours may not be fixed. AWRT and the Joint Commenters request a clarification of how to report employees on leave, those terminated but still on the payroll and contract employees.

32. In the *Notice*, we also requested comments on whether the job titles listed for each job category were appropriate. The legislative history provides no specific guidance regarding an appropriate definition for each of the job categories for the annual reporting form and the investigation processes. However, the House report notes "that the Commission has not recently reconsidered the job category definitions required for the existing annual statistical employment report." The House then directs the Commission to reexamine these "job categories for the specific purpose of ensuring that the definitions accurately reflect the nature of the categories and the specific positions within them."[20]

33. Most of the parties commenting on this issue believe that the job categories should not be changed. Commenters, such as NCTA, the Equal Employment Advisory Council (EEAC), Centel and the Joint Commenters, note that these are the classifications used by EEOC and should be retained. In particular, NCTA and the Joint Commenters state that the existing general definitions of job categories allow the cable operator the flexibility needed to report the wide range of employees within cable companies.

34. Several commenters suggest minor changes to the list of job titles. For example, NCTA and the Joint Commenters recommend the addition of "salaried supervisors who are members of management" to the job category titled officers and managers. EEOC suggests that the word "person" should be replaced by either "technician" or "worker" (*i.e.*, camera technician instead of cameraperson). EEOC also believes that stagehands should be moved from the technical to the laborer category and that it is more appropriate to classify computer operators in the office and clerical workers category than in the technical category, as they

[20] *See* House Report at 91.

are now classified. Further, EEOC suggests additional minor modifications to the job titles listed in each job category.

35. A few commenters, such as AWRT, UCC/ACT, and the New York City Bureau of Labor Statistics (NYC), believe that the job titles should be more cable industry specific. UCC/ACT has specific suggestions for cable industry job titles to be added.[21] AWRT states that doing this would facilitate completion of the employment report and would ensure uniformity in the categorization of positions. Also, AWRT suggests that the general descriptions of each job category be made more complete.

36. The Cable Act also requires each cable entity to provide annual data on part-time employment by race and sex. This requirement is similar to that of our current rules. In order to minimize the reporting burden, we proposed to revise our rules to combine these data into two categories. The first grouping would include the upper four job categories (*i.e.*, officials and managers, professionals, technicians and sales persons) and the second would be the total of all job categories. We requested comment on whether this information would fulfill the requirements of the statute.

37. UCC/ACT and the Black Citizen's for a Fair Media, *et al.*, (BCFM) state that this proposal would be inadequate and a violation of the Cable Act because it explicitly requires data for each of the nine job categories. Further, BCFM asserts that this would make it more difficult to evaluate whether minority and female employees are gaining access to part-time jobs. EEOC recommends two alternative sets of classifications for reporting these data. They suggest either "white collar" (comprising the upper five job categories) and "blue collar and service workers" (comprising the remaining four job categories) or "white collar and service workers" (comprising the upper five job categories and the service workers category) and "blue collar" (comprising skilled craftspersons, semiskilled operatives and unskilled laborers).[22] Finally, Cole, Raywid & Braverman, on behalf of cable operators (Cable Operators), requests a further explanation of how the

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[21] For example, UCC/ACT believes that the public access director should be included in the officials and managers job category.

[22] EEOC and NCTA also note an inconsistency between the text of the *Notice* and the proposed Form 395A in Appendix B. In the *Notice*, we stated that the two groupings for part-time statistics would be the upper four job categories and the aggregate of all other categories. However, the proposed form groups the data by upper four job categories and the total of all job categories. NCTA prefers the format on the proposed form since it is consistent with the current evaluation of the data. As indicated in paragraph 39, we are including part-time and full-time employees in the same table.

Commission will take these data into account when the cable entity's employment profile is compared to the processing guidelines.

38. Under the reporting requirements we are adopting, all EEO units or headquarters units employing more than five full-time employees will be required to complete the data portion of Form 395A.[23] However, we are modifying the format for submitting these data to conform with EEOC's EEO-1 form. We believe that this approach will minimize the reporting burden, particularly for those cable operators subject to EEOC's reporting requirements.

39. The revised format will consist of a grid identical to the one on the EEO-1 form. For each EEO unit or headquarters unit with more than five full-time employees, the cable entity will enter the number of employees, full-time, part-time, apprentice or on-the-job trainee, for each job category by sex and race or national origin classification.[24] Those units that file an EEO-1 form may substitute a copy of that filing as an attachment to the Commission's form if they choose. This will eliminate duplication of preparation effort for those entities that must also file with the EEOC.

40. In spite of OMB's objection to the collection of data regarding ethnicity as well as race and sex, we will continue to request these data. All of the ethnic or national origin classifications mentioned in the Commission's proposal are recognized by OMB, EEOC and the Commission as minority groups.[25] In fact, in many areas, ethnic or national origin minorities are the largest minority group in the labor force (*e.g.*, Hispanics in El Paso,

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[23] A full-time employee will be defined as an employee who regularly works at least 30 hours per week. This is the same definition of full-time employees that is currently used by the Commission for broadcast EEO reporting purposes.

[24] This procedure eliminates the separate reporting format for part-time employees. Based on our experience with the broadcast industry, we requested these data separately for the cable industry because we feared that possible differences between the hiring practices for full-time and part-time employees might skew the entity's employment profile. A cursory review of Form 395A data previously submitted to the Commission indicates that temporary or part-time employment is not significant in the cable industry. Therefore, we believe that it is appropriate to combine all employment statistics in one report. Furthermore, there is no indication that discrimination is more likely to occur against part-time employees than against full-time employees. If so, we believe the Commission will become aware of its existence through complaints or during the periodic investigation.

[25] For example, the Form EEO-1, includes ethnic classifications. *See* also Section 309(i)(3)(C)(ii) of the Communications Act of 1934, as amended (lottery provision definition of minority group).

Texas). Thus, data on significant groups covered by the affirmative action provisions of the Cable Act would not be available if the ethnic and national origin classifications were deleted from the form.

41. We see no reason to change the job categories or their definitions at this time. We believe that the job categories, their definitions and most of the suggested job titles are generally appropriate as proposed in the *Notice.* These are the job categories listed in the statute and are the same as those used by EEOC on its Form EEO–1. Further, our description of each job category is identical to that of EEOC.

42. The job titles listed for each job category are intended to give an indication of the types of cable industry jobs that are likely to be consistent with the responsibilities described for each job category. We are satisfied that most of the job titles included in each job category are appropriate for the cable industry. Moreover, we do not believe it is necessary to add job titles. Additional titles would likely not correspond with the employment classifications of many cable systems and could be particularly cumbersome in cases where an individual employee's responsibilities overlapped classifications. As currently defined, the job categories allow each cable operator the flexibility to classify each employee in the manner that best represents his or her duties and responsibilities.[26] Should any questions arise regarding the classification of employees on the annual report, the Commission may require additional documentation in the context of the periodic investigation or through a Multiple System Operator Reporting Agreement (MRA) (see discussion below). For these reasons, we will adopt the job titles and descriptions as proposed in the *Notice* with only minor modifications (i.e., replacing the word "person" with "worker" or "technician" as suggested by the EEOC) and to eliminate certain classifications such as "weaver" that clearly do not pertain to the cable industry.

43. *Labor Force Data.* As set forth in Section 634(d)(3) of the Cable Act, the annual statistical report must also include the numbers of minorities and women in the relevant labor market for each job category. Accordingly, we proposed to add this information to the existing Form 395A. In the *Notice*, we stated that we believed that these labor force data were available through each state's employment security division and accessible at an employment center located near the cable system. We requested com-

[26] However, we accept the EEOC's suggestion that stagehands should be recategorized as laborers, and that the title "weavers" be eliminated.

ments on the availability of labor force data on an aggregate basis and by occupational availability.

44. We also noted that labor force data are generally available on a county basis, or aggregated by standard metropolitan statistical area (SMSA), metropolitan statistical area (MSA) or primary metropolitan statistical area (PMSA) basis.[27] We proposed that a cable employment unit use data for the MSA where its employment office is located. If the employment office is not located in an MSA, we stated that county data could be used. For headquarters units, we indicated that national data may be the most appropriate. We sought comments also on the geographic area that is most appropriate for reporting the relevant labor market for employment and headquarters units.

45. EEOC states that the data we seek are available through the research offices of each state's employment security agency. OMB states that they have contacted several of these state agencies to request information on women and minorities in the labor force. The data these state agencies had were reprints of U.S. Department of Labor statistical reports based on census data. OMB claims that our requirement that cable entities supply the Commission, one Federal agency, with data produced by another Federal agency is wasteful and burdensome. OMB believes that we could meet the requirements of the statute by supplying each entity with the appropriate census-based data. If necessary, the cable operator could add and explain any adjustments that would more accurately reflect the local labor market. The American Legal Foundation (ALF) contends that we should only require the submission of occupational availability data where it is readily available. Centel, in its reply, suggests that other data bases may be available in the marketplace. Centel believes that the Commission should investigate the availability of these alternative sources and establish criteria for using alternative sources.

46. Many parties commented on the issue of the appropriate geographic unit of the relevant labor market. For individual employment units, the Joint Commenters, NCTA and the Cable Operators comment that cable operators should have the discre-

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[27] Prior to 1983, data were available on an SMSA (Standard Metropolitan Statistical Area) basis. In 1983, OMB changed the reporting unit from SMSA to MSA. These two areas are equivalent. *See Metropolitan Statistical Areas 1983*, published by the Office of Management and Budget. An MSA is a geographic area that consists of a central city, the county in which it is located and contiguous counties with a high degree of economic and social integration with the central city.

tion to submit the labor market statistics that they believe are the most appropriate for their community. These commenters generally note that the Cable Act does not require any particular rigid definition of the local labor force. NCTA and the Joint Commenters state that factors such as location, geography, transportation and the local economy affect a cable entity's employment circumstances. NCTA suggests that a cable system be allowed to choose the MSA, the county or the franchise area as the relevant labor market. ALF and the Joint Commenters concur with NCTA that franchise area should be added. Additionally, the Joint Commenters suggest that the Commission adopt guidelines to assist cable entities in defining the relevant labor market. EEAC recommends that the Commission adopt the Office of Federal Contract Compliance Programs' (OFCCP) approach that recognizes that there may be qualified applicants in the local labor force for entry level positions but many firms recruit nationwide for high level or highly technical positions.[28] UCC/ACT asserts that the labor force data should, as nearly as possible, approximate the labor force of the area served by the cable system, and not just the area where the cable unit's employment office is located. According to NCTA, the Commission should assume that the cable operator's choice is reasonable and justifiable. The Cable Operators suggest that if an area other than the MSA, or county where the employment unit is outside the MSA, is chosen, then it could be justified at the time of the five-year investigation.

47. Regarding the appropriate geographic unit for labor force data for headquarters units, many parties, such as UCC/ACT, the Cable Operators, NCTA, Centel and the Joint Commenters, comment that the national labor market may be relevant for the upper level positions for which individuals may be willing to relocate. However, many believe that this choice is unrealistic for most middle management, sales, clerical, technical and skilled labor jobs that are likely to be filled by individuals who live in the area immediate to the headquarters unit. ALF and NCTA state that the Commission has previously treated headquarters units in the same manner as other cable employment units and applied MSA data to those entities located in an MSA and county data to

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[28] The *Federal Contract Compliance Manual* § 2-160.5a states in part:

> The area in which a contractor can reasonably recruit will often be different from [the] immediate labor area, depending upon the skills involved in the job group, and thus will often exert a controlling influence on the requisite skills availability data that are appropriate for use in the analysis.

those located outside an MSA. NCTA believes that the Commission should adopt a flexible approach, accepting MSA, county or franchise area data. The submitted data should be assumed to be reasonable and valid, in NCTA's view. According to ALF, if the Commission adopts the proposal to apply national data to headquarters units, then these entities also should be allowed to submit county and MSA data. Centel states that each headquarter's unit should have the discretion to chose the relevant market for its various job categories.

48. Other commenters focused on the mechanics of submitting the data to be required on Form 395A. OMB, for example, states that the instructions do not explain how to complete the boxes labeled SMSA, MSA, PMSA and county. OMB also states that we do not define the terms "available labor force," "occupational availability" or "source" and we do not explain which sources would be acceptable. The commenters also note that the Form 395A instructions are not clear as to whether occupational availability data should be reported in the form of absolute numbers or percentages. UCC/ACT and NYC suggest that labor force data should be reported using the same grid that is required for full-time employment statistics to avoid counting minority women twice.

49. As set forth in Section 634(d)(3) of the Cable Act, it is the responsibility of each entity filing a statistical report to include not only a breakdown of its own employees by race and sex but also a comparable report on the number of minorities and women in the relevant labor market. Section 634(d)(2)(C) requires the system operator to use data of this type to "evaluate its employment profile and job turnover against the availability of minorities and women *in its franchise area* (emphasis added)." The legitimate point has been raised in the OMB filing that it makes little sense for the Federal government to collect labor force information through the census process, require businesses to obtain that data from the Federal government, and then require that they refile it with the Federal government. To the extent this back-and-forth filing can be eliminated it clearly should be. The statute remains clear, however, that there is a filing requirement on the part of the system operator and it must have the information before it in any case to comply with the evaluation requirements of Section 634(d)(2)(C). Moreover, while some general guidance can be provided as to the scope of the "relevant labor market" the statute, by imposing the filing obligation on the system operator, appears to impose on the system the initial task

of defining that area as well. Thus, we cannot simply exempt systems from this part of the filing obligation. To minimize the burden of this requirement and in recognition of the point raised by OMB, we are investigating the possibility of supplying each cable employment unit with the county or MSA labor force statistics for each individual cable entity on Form 395A before it is sent to the operator. The statute is specific, however, that it is the operator's responsibility to have and to file this information reardless of whether the Commission is able to develop a system for making the data more readily available. The EEOC, however, has this information and at this point we see no insurmountable obstacle to pre-printing it on the annual forms before they are mailed out.

50. The data provided and used by the Commission in the analysis of the Form 395A will, in the absence of an alternative submission, be the data for the MSA in which the employment office is located. If the employment office is not located in an MSA, the data for the county in which it is located will be used. In the case of headquarters units, we will use national labor force statistics for the top four categories and local data of the lower four categories. We believe that these data generally will comport with the hiring practices of cable employment offices and headquarters units.

51. We will, however, allow the cable entities to substitute alternative labor force data. The Cable Act places the principal responsibility for the identification of the relevant labor force on the system operator. Although under earlier rules the Commission had indicated that it would itself undertake to define appropriate labor pools using a flexible approach based on a review of relevant geographic and demographic considerations, experience indicates that this is not a function that can be peformed centrally by the Commission with any facility given the many variables involved and our lack of information concerning labor force hiring patterns for the thousands of areas where there are cable employment units subject to the reporting requirements. We have generally used either MSA or county data in the past and we expect that such data will continue to be relevant to the majority of situations in the future as well. We recognize, however, that MSA or county area data may not always be appropriate and their use could be counterproductive. Systems must undertake a self-analysis as part of the affirmative action program required by the Cable Act so that use of relevant data rather than a centrally

dictated arbitrary standard is particularly important.[29] The use of alternative labor force data must be accompanied by a brief explanation as to why these data are more appropriate than MSA or county data. For example, such explanations might be based on the fact that one (a) the distance of the employment unit from areas of minority concentration in the MSA is great; (b) commuting from those areas to the cable unit is difficult (such difficulties will usually be based on distance but may also be based on other factors such as lack of public transportation); or (c) that recruitment efforts directed at the MSA minority labor force have been fruitless.[30]

52. As a final matter, we also will add more explicit instructions and definition of terms on the Form 395A, as requested by OMB and other commenters.

53. *Additional Information.* In the *Notice*, we proposed to add several elements to the existing Form 395A that we believed would indicate whether the cable operator is implementing the EEO policies and program set forth in subsections (b), (c) and (d) of the Cable Act. This additional information would include the number of hires and promotions, categorized by sex and race or national origin in the upper four job categories and the total of all other job categories, and a list of recruitment sources contacted by the cable operator over a twelve month period.[31] Regarding

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[29] The legislative history of the Cable Act suggests that the principles set forth in Title VII of the Civil Rights Act of 1964 should govern proceedings before the Commission under the Cable Act. *See* House Report at 93. Some guidance for establishing what should be considered within the relevant labor area may be obtained from decisions under Title VII. In one leading case, the issue was whether the labor pool for Fairfax County, Virginia, a suburban Washington, D.C. county, should cover the whole of the Washington SMSA. The court concluded that it should not, citing a number of factors contributing to the separation of Washington, D.C. and Fairfax and inhibiting a flow of applicants, including the distances involved, the absence of conveniently available public transportation and the salary differentials between the communities. *See U.S.* v. *County of Fairfax*, 629 F. 2d 932 (1980).

[30] *Compare Renewals of Indiana, Kentucky and Tennessee Broadcast Stations* (WHIN/WWKX, Gallatin, Tennessee) FCC 83-574, 54 RR 2d 1473, 1484 (1983) *with Media-Com, Inc.* (WDBN-FM), FCC 84-70, 55 RR 2d 1291, 1294 (1984). In the case of WHIN/WWKX, no showing had been made relative to the licensee's efforts in Nashville, while in the case of WDBN-FM, a substantial documented showing indicated that the distance from areas of minority concentration to the station was a mitigating factor. *See Application of Radio Station WPFB, U.C.-Inc. for Renewal of License of Station WSMJ(FM), Greenfield, Indiana*, 66 FCC 2d 459 (1977). Also, *see, e.g.* letter from Glenn A. Wolfe to M. Christopher Derick, dated February 15, 1985 (system allowed to use data for various counties rather than St. Louis PMSA data); letter from Glenn A. Wolfe to Jerry Haines Esquire, dated April 3, 1984 (station in Port Huron, Michigan, may use St. Clair County data rather than Detroit PMSA).

[31] EEOC notes that the Commission proposed to require data for the upper four

this proposal, OMB requests clarification of the instructions. It states that it is unclear whether these data should be reported as absolute numbers or percentages. Also, OMB states that it is unclear whether we are requesting recruitment sources in general or only those for female and minority employees. OMB further questions the need for these additional data. Centel likewise believes that we should not request the submission of these data since they are not required by the statute. Centel contends that interpretation of these data would have to be subjective and would interject the Commission into management decisions that the cable operator is entitled to make. Centel believes that a statement certifying compliance with the provisions of Sections 643 (b), (c) and (d) would be sufficient.

54. Several commenters believe that the Commission's proposal to collect hiring and promotion information would not provide sufficient data to certify that the employment unit is in compliance with the provisions of Section 634. NYC, UCC/ACT and BCFM argue that the data on hiring and promotions should be submitted for each of the nine job categories individually. In UCC/ACT's view, the proposed format would not allow the Commission to identify instances of "ghettoization."[32] According to BCFM and UCC/ACT, this format would not show instances where a promotion does not result in increased pay or responsibility. UCC/ACT comments that the proposed form does not require compliance with Section 634(c)(5) regarding training and that this should be added to the form. UCC/ACT also states that a section regarding on-the-job training is needed on Form 395A.

55. Our initial proposal focused on only a few of the many elements of the EEO policies and practices enumerated in Section 634 of the Cable Act. We now believe that this proposal would not provide us with sufficient information to verify that the cable entity is in compliance with the EEO provisions of the Cable Act. Furthermore, we believe that our original proposal may have placed excessive emphasis on statistical information and omitted certain other necessary information concerning the cable entities EEO policies and practices. Accordingly, in addition to the hiring

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job categories and the aggregate of all other job categories for hires and promotions in the text of the *Notice*. However, the proposed Form 395A requests this information for the upper four job categories and the total of all job categories.

[32] "Ghettoization" is the situation where minorities and women are represented in one or more of the upper four job categories but are virtually excluded from other upper four job category positions. *See* House Report at 89.

and promotion information proposed in the *Notice*, we will require the submission of some additional information.[33] This additional information will consist of the series of questions addressing the policy aspects and program obligations of Section 634.[34] Each question will require a "yes" or "no" response. A "no" response to any question will require a further explanation as to why this aspect of the EEO program was not complied with. We believe that this approach will provide us with the necessary data to fulfill the certification requirement of the Cable Act without being overly burdensome on cable operators. The proposal that the cable entity be required to submit detailed recruitment information on the Form 395A will not be adopted. Instead, recruitment activity will be the subject of one of the questions on the report.

56. *Public Inspection.* Section 634(d)(3) of the Cable Act requires that the annual employment report must be available for public inspection at the central office of each cable entity and at any location that has more than five full-time employees on a regular basis. Our existing rules require that these annual statistical reports and the EEO program filed with the Commission must be available for public inspection at the principal workplace of each employment unit or another accessible place.[35] The rules also specify that they must be retained for five years. In the *Notice*, we proposed to conform the terminology of our rules to that of the Cable Act.[36]

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[33] OMB claims that the Commission has not shown how the hiring and promotion data will be useful in detecting or deterring discrimination that would not be detected or deterred by other agencies. We believe that OMB misunderstands our mandate. We are required by the Cable Act to do more than simply detect and deter discrimination. Our function is to certify that cable operators do not discriminate (Section 634(b)), that they have a positive program of specific practices designed to ensure equal employment opportunity (Section 634(c)) and that they regularly evaluate the results of their practices relative to the available minority and female labor force (Section 634(d)). We believe that the information we proposed to collect is the minimal amount needed to be consistent with the intent of the statute. Without this information, we would have no way of determining whether the cable operator even has the means for undertaking the analysis required by Section 634(d)(2)(F) of the Cable Act. Conversely, if the summary data are prepared and presented, we are assured that the cable operator has in place the means to analyze its efforts and we are in a position to certify that the operator has in fact complied with the EEO provisions of the Cable Act.

[34] The questions parallel the major EEO program requirements contained in the new Section 76.75 of the rules. For example, one of the questions that will be included on the Form 395A is "Does the cable entity disseminate its EEO program to job applicants, employees, and those with whom it regularly does business?" (*See* Section 634(d)(2)(A) of the Cable Act.)

[35] *See* Section 76.311(j) of the Commission's rules.

[36] The proposed Section 76.79(b) would require that the annual employment and

57. A few parties commented on the issue of record retention. UCC/ACT seeks a clarification of the definitions of "central office" and "principal workplace." Without a clarification, the commenter believes that it is possible to misinterpret the meaning of the term central office as the headquarters unit. UCC/ACT believes that Congress meant the principal workplace of the local cable system. BCFM requests that the Commission explicitly state that these filings are to be available at both the central office and any work place employing more than five employees.

58. According to UCC/ACT, neither the Cable Act nor the Commission in the *Notice*, specifies the length of time the forms must be retained. They state that a seven-year retention requirement would be consistent with the cable EEO enforcement activities prescribed in the Cable Act.[37] UCC/ACT also proposes adding a statement regarding these record retention requirements to the instructions for Form 395A. The United States Catholic Conference (Catholic Conference) proposes that the Commission require each cable system to publish a notice informing the public of its EEO filing with the FCC and the location in the community where it is available for inspection. The Cable Operators, in their reply, assert that this proposal should be rejected since it would go beyond the requirements of the statute.

59. In the *Notice*, we noted that the requirements of the Cable Act relating to the retention of the annual statistical report for public inspection were essentially the same as the existing regulations. The principal difference is in terminology. While nothing in the comments leads us to change our basic proposal, it is apparent that there is a need for clarification of our intent and of the wording of the rule.

60. We will require each individual employment unit to maintain a public inspection file at its central office and at any other work place that is part of the employment unit and has more than five full-time employees. This file must include copies of the annual employment reports. Each headquarters unit will be required to maintain a public inspection file that includes its annual employment reports and a consolidated set of all documents pertaining to the other employment units of the MSO at its central office.

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investigation reports be retained and made available for public inspection at the central office and at every location with more than five full-time employees for five years.

[37] *See* Section 634(f)(1).

61. Contrary to UCC/ACT's comments, we proposed that all documents must be retained for five years, as is required under our existing rules. This time period is particularly appropriate now that each employment unit will undergo a Commission investigation once every five years. We do not believe that a statement regarding the placement of Form 395A in the public inspection file is needed on the instructions to that form, as UCC/ACT suggests. Each cable operator is expected to be familiar with the Commission's rules. Finally, we believe that the Catholic Conference's recommendation that each cable system be required to publish a public notice regarding its Form 395A filing would place an unnecessary burden on the cable operator.

B. Annual Certification

62. Section 634(e)(1) of the Cable Act requires that the Commission annually "certify" each cable entity, including each headquarters unit, is in compliance with paragraphs (b), (c) and (d) of Section 634. The Cable Act states that certification is to be based on information in the possession of the Commission, including the annual employment report.[38] The statute does not, however, specify how the Commission is to carry out the certification process. In the *Notice*, we proposed to certify cable entities based on the information contained in our proposed Form 395A and any other relevant information before the Commission. Certification would be withheld only in those instances where the available information suggests that the cable entity's EEO efforts are deficient. As part of the certification process, we proposed to use our existing EEO processing guidelines to perform an initial screening of the information on Form 395A.

63. *Use of Processing Guidelines.* In the *Notice*, we proposed to certify cable entities as complying with the EEO requirements of the Cable Act based on the information contained in the proposed FCC Form 395A and any other relevant information that might be before us. In addition, we stated that as an aid in this determination, we intended to use our existing EEO processing guidelines to evaluate the compliance of cable entities with our

[38] The House Report suggests that other available relevant information, such as complaints filed by employees or applicants, information from the franchising authority or information submitted by public or private organizations, shall be considered by the Commission when determining compliance. *See* House Report at 88.

EEO standards.[39] The proposal to use the existing EEO processing guidelines generated a considerable amount of controversy and comment. Several parties comment that the use of processing guidelines would be tantamount to a quota system and contrary to the intent of the statute. Centel states that "it is clear that there must be no parity or similar 'quota-type' requirements." The Civil Rights Division of the Department of Justice (Department of Justice) states that Congress did not intend that a numerical standard be used to evaluate disparities between the minority and female composition of a cable entity's workforce and the composition of the relevant labor market. The Department of Justice states that any such use of a numerical standard would contradict the intent of Congress. The United States Commission on Civil Rights (Civil Rights Commission), in its comments, indicates that the Commission's "proposed rules impermissibly interpret the Cable Act's EEO provisions by claiming authority to impose employment quotas which the Congress clearly withheld."

64. ALF, in its reply comments, supports the view that the use of processing guidelines is both a violation of the Equal Protection Clause of the U.S. Constitution, and a direct contravention of the Congressional intent of the Cable Act. BCFM, in its reply, indicates that the use of processing guidelines is appropriate and within the statutory authority of the Commission. BCFM states that the Commission's existing processing guidelines are not prohibited by the Cable Act nor the legislative history and are not constitutionally suspect.

65. Several members of Congress also commented on our proposal to use our existing processing guidelines in reviewing EEO compliance. Congressmen Dingell, Wirth and Leland, in their joint letter, state that "all Congressional parties involved with the drafting of this section of the Cable Act understood and anticipated that the legislation adopted would permit the Commis-

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[39] The Commission currently selects for further review those employment units with five to ten employees where the most recent anual employment report indicates that minorities and/or women are employed on a full-time basis at a ratio of less than 50 percent of their availability in the labor force with respect to all full-time jobs and at a ratio of less than 25 percent of their availability with respect to full-time jobs in the upper four job categories. Employment units with eleven or more full-time employees are subject to further review where the most recent annual report shows that minorities and/or women are employed on a full-time basis at a ratio of less than 50 percent of their availability in the labor force with respect to all full-time jobs and at a ratio of less than 50 percent of their availability with respect to full-time jobs in the upper four job categories. *See* Public Notice No. 1364, December 15, 1983. *See Report and Order* in Docket 20829 *supra*.

sion to continue to utilize processing guidelines in monitoring cable industry EEO compliance."[40] The Congressmen also indicate that the Commission's use of processing guidelines is "clearly permissible" under the Cable Act. Congressmen Dingell, Wirth and Leland state that they strongly support the continued use of processing guidelines as a means of assessing EEO compliance and as an indicator for when additional Commission scrutiny may be necessary. Senator Hatch, on the other hand, expresses serious concerns about the proposal to use the existing processing guidelines to evaluate EEO compliance.[41] Senator Hatch states that such numerical standards have little in common with the language of the Cable Act; and, that the use of arbitrary numerical tests constitutes bad public policy because they ultimately frustrate the very objectives they are designed to achieve. Senator Hatch further questions why the Commission has chosen a standard contrary to other Federal affirmative action regulations, such as those administered by the OFCCP.

66. The question of how these processing guidelines would be used in conjunction with the requirements of the Cable Act received substantial attention in the comments. The Anti-Defamation League of B'nai B'rith (ADL) is concerned that the processing guidelines may function as a hiring quota in the cable industry. ADL suggests that the proposed regulations should be amended to include the processing guidelines "explicitly stating that statistics alone will not support or rebut a finding of EEO deficiency." EEAC, in its comments, indicates that it assumes that the Commission intends to use the processing guidelines simply as a means for channelling limited compliance resources, and not as a device for imposing *de facto* employment quotas of the type which were removed from the Cable Act legislation prior to enactment. EEAC further states that the Commission should not presume that cable entities with employment profiles below the rates specified in the processing guidelines are out of compliance with the EEO standards. Similarly, NCTA states that noncompliance with the EEO requirements of the Cable Act must be based on a finding that a cable system has not in good faith implemented an EEO plan. It should not, in NCTA's opinion, be based on a numerical evaluation of the statistical report. NCTA states that based on its understanding of the Commission's

[40] *See* Letter to Honorable Mark S. Fowler, Chairman, Federal Communications Commission, dated June 19, 1985.

[41] *See* Letter to Honorable Mark S. Fowler, Chairman, Federal Communications Commission, dated June 28, 1985.

review processes, it can accept the general approach proposed in the *Notice*. NCTA urges, however, that the Commission clearly state that the processing guidelines are to be used only as a screening mechanism in the evaluation of a cable operator's EEO performance.

67. The National Black Media Coalition (NBMC), on the other hand, states that the certification procedure appears to be designed to make it all but impossible for a cable system to fail to be certified.

68. In its reply comments, NAMIC urges the Commission to clarify that the processing guidelines will be used as an "investigative trigger" and will not constitute a quota system. BCFM asserts that the Commission's processing guidelines have been critical in helping to identify media entities that had ineffective or discriminatory employment practices. BCFM also states that goals and timetables have been critical in assessing the effectiveness of plans and programs designed to remedy such discriminatory practices. In addition, BCFM believes that the continued use of such tools is well within the Commission's authority and was anticipated by Congress.

69. While there is no clear or explicit guidance provided in the Cable Act with regard to the certification procedure, we believe that a plain reading of the language contained in paragraph (e)(1) of Section 634 of the Cable Act demonstrates that Commission review of the statistical report is warranted. Paragraph 634(e)(1) states:

> [o]n an annual basis, the Commission shall certify each entity described in subsection (a) as in compliance with this section if, on the basis of information in the possession of the Commission, *including the [statistical] report filed pursuant to subsection (d)(3)*, such entity was in compliance, during the annual period involved, with the requirements of subsection (b), (c), and (d). (Emphasis added.)

70. We believe that there is no legal bar to the Commission's continued use of its processing guidelines for the purposes of the annual certification requirement contained in the Cable Act. We find nothing in the record of this proceeding, in the statute, or the legislative history to indicate that the Cable Act prohibits the Commission from using its existing processing guidelines.

71. We also find the constitutional questions raised by the ALF and other commenters to be without merit. The arguments raised here rest essentially on the premise that the Commission's use of processing guidelines is a quota system. These guidelines are clearly not intended to be used for any such purpose. Further-

more, we intend to work to assure that they do not unintentionally serve as a quota system.

72. In addition, the Commission has addressed the matter of processing guidelines on a number of occasions, most particularly in the context of the similarly used guidelines for broadcast licensees. In its decision in *EEO Processing Guidelines*, 79 FCC 2d 922 (1980), the Commission rejected an argument by the National Association of Broadcasters (NAB) alleging, *inter alia*, that the processing guideline were quotas defining employment results that broadcasters were required to achieve.[42] In making that decision, the Commission explained that the processing guidelines are an administrative device by which the Commission determines which of the broadcast licensees filing renewal applications will have their station's EEO program subjected to further staff review. This determination is based on our analysis of the station's employment profile plus the licensee's efforts to recruit and employ minorities and women. *Id.* at 926. Thus, the Commission concluded that the processing guidelines in no way set quotas for a licensee. In accordance with this decision the Commission dismissed NAB's argument that the processing guidelines are substantive rules and regulations that trigger the notice and comment requirements of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. The Commission pointed out that the guidelines are intended to regulate the Commission's own behavior, and should not be construed as having a substantial impact on broadcast conduct. Therefore, the processing guidelines are exempt from the notice and comment requirements of Section 553. *Id.* at 927.

73. The General Counsel of the Commission has also found that the Commission's broadcast EEO rules do not impose hiring quotas. *Opinion of General Counsel/EEO Rules*, 44 RR 2d 907, 909 (1978). Following the United States Supreme Court decision in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1975), the General Counsel of the Commission was asked to determine the impact of that decision on the Commission's EEO rules. The General Counsel concluded that the *Bakke* case did not cast any doubt on the Commission's EEO rules and policies. In distinguishing the University of California's special admission program and the Commission's EEO rules, the General Counsel noted that the EEO rules and policies, including the processing guidelines, "do not establish fixed hiring quotas for minorities."

[42] *Dismissed without opinion*, 610 F. 2d 1000 (D.C. Cir. 1979).

Opinion of General Counsel/EEO Rules, supra at 909.

74. After full consideration of the record, we have developed a new process for evaluating EEO compliance. We believe that this new procedure will better judge a cable entity's performance based on its overall efforts rather than solely relying on the composition of its workforce. This process will consider any EEO complaints filed against the entity, responses to the questions concerning the entity's workforce. In developing this process, we recognized the concerns raised by some commenters with respect to use of our existing guidelines and the possibility that the certification of compliance function might serve as a quota system. It is our intention that certification of compliance be based on a comprehensive analysis of a cable system's efforts to comply with the EEO requirements and note simply statistical measures of its workforce. Accordingly, we have designed the certification process and criteria to ensure that full consideration is given to the full range of available information describing a cable entity's EEO efforts.

75. However, we continue to believe that our existing guidelines for examining employment statistics are a useful tool and will use them in the certification process. As described below, these guidelines will be used only for screening the statistical information to reveal cases where more in-depth examination of actual employment activity is warranted. Use of the guidelines in this manner will provide the Commission with an economical and effective method of evaluating the statistical information from the over 5000 cable entities that are subject to certification each year. We believe this will speed the certification process and enable the Commission to use its limited resources in the most efficient manner.

76. *Certification Process.* We will certify based on several different indicia of efforts. Our administrative processing guidelines—the relationship between the numbers of minorities or women employees—will be used solely for an administrative purpose in this process, i.e., to sort out those systems which may require further review of their EEO efforts. In any event, certification will be based on the evidence of efforts contained in the answers to the 395A questions, discrimination complaints and any further information that the cable entity may provide or that the Commission may request in individual cases. This review will be even more thorough for those systems which fall below the Commission's administrative processing guidelines. The certifica-

tion process itself will consist of a series of separate examinations of the information from Form 395A, any EEO complaints that may have been filed, and, if necessary, additional information that may be supplied by or requested from the cable entity. The initial step will be to examine the cable entity's Form 395A for completeness. Where the cable entity has failed to file the required report, or where the report has been found to be substantially incomplete, certification of the cable entity will be withheld. In this regard, we will consider a report substantially incomplete if the cable entity has failed to submit the required statistical information, failed to answer any of the required questions, or failed to respond to any request for additional information.

77. The second step will be to determine whether any EEO complaints have been filed against the cable entity, either with the FCC, the EEOC, or elsewhere, relating to the certification period. In cases where an adjudicated decision has been issued finding discrimination in response to such a complaint, we will consider that finding to be evidence that the cable entity has not complied with the EEO requirements. We will examine the findings in such cases and will deny certification where a lack of compliance with Section 634 is indicated. In general, we will not consider unresolved complaints to be grounds for denial of certification. Furthermore, any such complaints that are ultimately judged to be cases in which the cable entity has discriminated in its employment policies and practices in violation of the EEO provisions of the Cable Act will be grounds for the Commission to take subsequent action to revoke certification that might otherwise have been granted.

78. The next phase of the certification process will be an examination of the answers to the questions in Part A of Form 395A (See attached Appendix C). If there are negative responses, we will examine any supplemental information or explanation the cable entity may have provided with respect to the questions. We will consider any negative responses that are not satisfactorily justified to be evidence that the entity has not met the EEO requirements and accordingly will deny certification in such cases. If all questions are answered in the affirmative, we will proceed to an analysis of the statistical information on Part B of Form 395A and any additional information supplied by the cable entity.

79. As part of the certification process, we will also review the statistical data contained in the annual report. The employment and labor force data will be compared to the processing guide-

lines. If the composition of the entity's labor force does not meet the processing guidelines, we would then examine any other information before us with respect to the cable entity's efforts. We would examine the hiring and promotion information on the Form 395A and, any explanatory statements or additional information supplied by the cable operator. For example, such additional explanations might include detailed analyses or statements concerning the relationships between the number of minority and female workers employed by the cable system and the number of minorities and women in the available labor force with background, skills or experience appropriate to the relevant job categories. If necessary, we would request additional information concerning the cable entity's actual EEO performance. Such requests for additional information might include inquiries with respect to the specific yes/no questions contained in Part A of Form 395A. Certification of compliance would be granted upon our determination that such explanations and information indicated the cable entity had made sufficient efforts to comply with the statute. In light of the discussion above relating to the permissible use of employment statistics, it is important to emphasize that if the record indicates that the cable entity is making reasonable and good-faith efforts to recruit and employ minorities and women and place them in responsible positions, certification will be granted even though there may be a disparity between the number of minorities and women employed and their respective proportions in the relevant labor market.

80. Upon completion of this review, the Commission will notify cable entities by mail of grant of certification of compliance with paragraphs (b), (c), and (d) of Section 634 of the Cable Act. In cases where certification of compliance with the EEO requirements is denied, we will inform the cable entity by letter. This letter will indicate the reasons why we were unable to grant certification and the consequences of this action, including any sanctions the Commission may deem necessary.

81. To summarize the certification of EEO compliance process, cable entities with no EEO complaints, affirmative responses to all of the questions on Part A of Form 395A, and an employment record or other information indicates sufficient efforts to comply with the statute will be granted certification of compliance. Certification of compliance will be denied or withheld in cases where: 1) the cable entity has failed to submit a Form 395A or has filed a substantially incomplete Form 395A; 2) the cable entity has been found as a result of an adjudicated complaint to

have discriminated in violation of the provisions of the Cable Act; or, 3) the cable entity's EEO program and practices (*i.e.*, EEO efforts) are found unsatisfactory. Given the Form 395A filing schedules involved, we anticipate that the annual certification period will extend from July 1 to June 30 of each year.

82. *Implementation of the Certification Process.* NCTA and Centel suggest that a three-year transition period be observed before conducting investigations and on-site inspections. NCTA believes this transition period would provide an adequate time frame for the FCC to accumulate the necessary computer facilities and personnel to process forms and to negotiate reporting agreements with operators. NCTA is concerned that certification will be delayed because of a backlog in the Commission's review processes. NAMIC would take a "wait and see" position and believes that if such a backlog occurs, the FCC should obtain more staff until the problem is resolved. NAMIC points out that there is no Congressional intent to delay enforcement of EEO compliance and that no transition period is necessary.

83. The Cable Act specifies that within 270 days of the effective date of this title, the FCC is to establish rules to enforce and effectuate the requirements of Section 634. The Commission agrees with NAMIC that there is no Congressional intent to delay implementation or enforcement of this section beyond the specified date. We will commence implementation and enforcement of this section as soon as possible after the effective date. It is our intention to effectively administer the EEO certification procedures upon their adoption. However, we recognize that implementation of the certification process entails development of substantial and complex procedures and automated data systems and that initially it is possible that we may experience some processing delays. While we intend to make every effort to avoid or minimize such problems, we wish to indicate that cable systems will not be penalized or otherwise held accountable for any certification delays that arise during the implementation period.

C. Investigations

84. Section 634(e)(2) of the Cable Act requires that the Commission investigate the employment practices of all cable entities at least once every five years. The purpose of these investigations is to determine whether each cable entity has been in compliance with the requirements of Section 634(b), (c) and (d), including whether the entity's employment practices provide minorities and

women equal employment opportunities. As part of this investigation, the Commission must also review the accuracy of employment practices and job classifications reported in the annual statistical report. Again, the statute and the legislative history provide only limited guidance with respect to the implementation of the investigation activity.

85. In the *Notice*, we proposed to investigate 20 percent of all cable entities each year primarily using a paper process. We proposed a new reporting requirement, Form 397, consisting of three parts. The first part (Part A) would ask identifying information of the cable entity and would contain a series of questions requiring "yes" or "no" responses. These questions address the policy aspects and program obligations of Section 634(b), (c) and (d) and are more detailed than the questions in Part A of the new Form 395A we are adopting. The second part (Part B) requests the statistical information contained in the annual employment report and would replace the submission of a Form 395A in the year of the investigation. The third part (Part C) asks that the cable entity submit data to support the statistical information contained in the annual employment report.

86. Specifically, we proposed that Part C of Form 397 would include a list of employees, their current job titles, job categories and a brief description of each employee's primary duties and responsibilities. In addition, we proposed to require that cable entities submit a list of all employees hired or promoted during the year by sex and race or national origin. We also proposed to require each entity to provide a list of the total number of contracts that were open for bid during the preceding twelve months, the total number of minority and female entrepreneurs that bid on each contract and the total number of contracts that were awarded to minority and female entrepreneurs. Finally, we proposed to permit cable entities to submit any additional information that they believed was relevant to our evaluation of their compliance with the EEO requirements.[43]

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[43] We also offered a second option for meeting this requirement that would encompass reviewing and evaluating the annual Form 395A filings for the previous five years, together with complaints of violations by employees or job applicants, and other information presented by the franchising authority and by private or public agencies or organizations. *See Notice* at footnote 18. NCTA comments that this proposal is insufficient for the investigation process. NCTA contends that the Commission should at least require some additional information to provide a better basis for detecting compliance with the statute's requirements. UCC/ACT states that a five-year trend analysis using the Form 395A filing should be performed in addition to the submission of

87. The Commission's proposed Form 397 received a significant amount of criticism from cable interests, minority groups and other parties.[44] OMB, in its filing, asserts that the Commission's proposal to collect this information exceeds the specific requirements of the Cable Act. OMB asserts that the Commission did not justify the collection of these data in the *Notice.*[45] OMB also states that the proposed form does not contain a statement informing the respondent why the information is being collected and how it will be used and whether response is voluntary, required to obtain a benefit, or mandatory, as required by the Paperwork Act. Centel and the Cable Operators also believe that the Commission has not justified the burden of this form and that it goes beyond the intent of Congress. NAMIC contends that the proposed form is burdensome without being useful.

88. With respect to the proposed "yes" or "no" questions in Part A, UCC/ACT expresses skepticism about the reliability of the yes/no responses for obtaining information that is substantially more complex. BCFM argues that the questions do not provide the amount, type, or specificity of information needed for the conduct of an effective investigation of a cable entity's EEO practices. NYC, NAMIC, and NBMC note that the "yes" or "no" questions allow the cable operator to determine what constitutes compliance, a judgment these commenters believe should be made by the Commission. The Joint Commenters recommend that cable operators have the option to add additional information that they believe is relevant to their response to any of the questions. NBMC states that the response to each question should require an explanation. Finally, some parties suggest additional questions, the elimination of some of the proposed questions, or modifications to the proposed questions.[46]

89. Many commenters consider Part C of the proposed Form 397 burdensome. NCTA doubts that this detailed information would be useful for indicating compliance with the statute and suggests that Part C be replaced by an organization chart or a discussion of the organization's structure and a description of the

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proposed Form 397. BCFM asserts that this alternative would be totally inadequate.

[44] We will only discuss comments on Parts A and C of the proposed Form 397 since Part B is identical to the annual employment report, Form 395A.

[45] Accordingly to OMB, to have the practical utility, the information must be significantly useful in detecting or deterring cases of employment discrimination that would not be detected or deterred by other Federal, State or local EEO laws and enforcement programs.

[46] *See*, for example, NCTA at 47-48, Cole at 11-13, Joint Commenters at 39-41, EEAC at 9.

internal audit system for maintaining its EEO program. Some of the commenters, notably Centel, the Joint Commenters, the Cable Operators, and NCTA, are concerned that this requirement would be intrusive on the privacy of employees, as the data will become publicly available for the first time.[47] According to Centel, similar data are already reviewed by EEOC and OFCCP and an additional review would not be fruitful.

90. The Joint Commenters, NCTA, Centel, EEAC, NAMIC and the Cable Operators state that for most cable companies the detailed job description information is not readily available and to prepare it would be a tremendous and costly undertaking. Further, it is likely to produce a massive amount of information that the Commission will not be able to process. Centel states that if the Commission insists on job data it should simply require a statement that job descriptions exist or at most require a one-time filing. NAMIC recommends the submission of a list of job titles, by department, in order of salary, at least for the upper four job categories. According to NCTA, Centel, and the Joint Commenters, the request for data regarding hiring and promotions on Form 397 will not add significantly to the material before the Commission as it is already reported on the annual employment report. However, these parties believe that it will impose an additional paperwork burden on cable operators. In the Joint Commenters' view, this reporting requirement would intrude on management's rights because it places the Commission in a role of second guessing a cable operator's decision as to which employees merit promotion.

91. NCTA and Centel state that the request for data on contract bids on the proposed Form 397 exceeds the requirements of the Cable Act. They argue that Section 634(d)(2)(E) of the statute only requires that a cable entity encourge all parts of its operation to conduct business with minority and female entrepreneurs. By limiting the inquiry to the bidding process, NCTA and the Joint Commenters assert that the Commission is ignoring the fact that once the cable system is operational, the cable operator rarely engages in the competitive bidding process in the conduct of ordinary business. OMB views this data request as burdensome and intrusive as it would require the cable operator to obtain information about every bidding firm's owners and their race, sex and ethnicity. However, UCC/ACT recommends expanding this

[47] The Cable Operators are particularly concerned that this information and other data requested on Form 397 that it considers proprietary will become public at the Commission or by its inclusion in the cable system's public inspection file.

question to include an explanation of why a contract was not awarded to a female or minority entrepreneur, if that was the case.

92. Several commenters recommend alternative approaches for investigating compliance with the Cable Act. NCTA suggests that compliance would best be assessed during on-site audits. EEAC recommends that this information be collected only if necessary during a compliance review. Other commenters, however, tended to believe that the proposal did not provide sufficient information. NYC, BCFM and NBMC recommend that the proposed Form 397 be replaced by a more detailed submission.[48] UCC/ACT and NAMIC recommend that Form 397 include the submission of an analysis of past practices and proposals for improving the employment unit's EEO program in accordance with Section 634(d)(2)(F) of the Cable Act. Finally, the Catholic Conference proposes that each cable operator be required to circulate, and certify that it has circulated, its investigation submission among its employees who are perhaps the best judge of the veracity of the submission.

93. We continue to believe that the investigative process should consist of the annual Form 395A certification information plus additional information to support the information on that report. As stated in the statute, the investigation should ensure that the entity is in compliance with the provisions of the Cable Act and that the statistical reports submitted by the cable entity accurately reflect employee responsibilities in the reported job classifications. After consideration of the record, however, we find that the filing requirements proposed in the *Notice* would be unduly burdensome for both the cable industry and the Commission. Accordingly, we are amending the investigation procedure, as indicated below, to limit the filing requirements to the minimum

[48] Among the additional information NYC believes that the Commission should collect would be details of recruitment, training and promotion policies, and copies of employment applications and recruiting advertisements. BCFM suggests that the investigation include three things: Form 395A, supplemented by the specific employment practices listed in Section 76.311(g) of the current rules; open-ended questions that require more in-depth responses; and the proposed Part C of Form 397. NBMCs proposal would require a cable operator to submit, in addition to the information requested by the Commission's proposal, data on the source of each applicant, training of prospective employees and the operation of cooperative training programs with schools and colleges.

necessary to carry out our statutory responsibility.

94. *Supplemental Investigation Sheet.* Several commenters raised questions whether the proposed Form 397 would replace the Form 395A for the year of the investigation or would be in addition to the 395A filing. To avoid any confusion regarding the Commission's cable EEO filing requirements and in view of the substantial modifications in the investigation filing requirement, we will not adopt the proposed Form 397. Instead, during the year in which a cable entity comes under investigation, a "Supplemental Investigation Sheet" will be included with the Form 395A that is sent to the cable entity. The cable entity will be required to submit the requested additional information with the regular annual report Form 395A.

95. The Supplemental Investigation Sheet will request additional information to support the cable entity's statistical filing and to support any questions that may arise regarding the cable entity's EEO prgram or practices. In order to meet the statutory requirement that the Commission ensure that employees are assigned to the proper job categories, Part I of the Supplemental Investigation Sheet will request brief descriptions of the major duties and responsibilities of employees listed in certain job categories. In the case of cable entities that have been granted certifications of EEO compliance in each of the years subsequent to their most recent investigation, this request in general will be limited to three job descriptions per employment unit. The job categories from which the job descriptions are to be selected will be specified by the Commission. In the case of cable entities that have been denied certification in one or more of the years subsequent to their last investigation, the Commissioner may ask for additional job descriptions in the same or other job categories. The nature and extent of the expanded request for job descriptions in such cases will depend on the nature of the problems in the cable entity's EEO program that resulted in denial of certification. In such cases, we intend to limit our additional requests to information relating to the specific areas where the entity was not found to be complying with the EEO requirements.

96. Part II of the Supplemental Investigation Sheet will ask specific questiosns concerning the cable entry's EEO practices and its conformance with the EEO requirements of the Cable Act and Part 76 of our rules. For example, one such question might be to describe the cable entity's efforts to promote minorities and women in a non-discriminatory fashion to positions of greater

responsibility under the requirements of Section 634(d)(a)(D) of the Cable Act and Section 76.75(d) of the Commission's rules. We will ask cable entities that have been granted certification in each of the years subsequent to their most recent investigation to respond to three such questions. We may also ask cable systems that have been denied certification in one or more of the years subsequent to their last investigation to respond to additional questions. In such cases, the additional questions will be directed to the specific EEO program deficiencies that formed the basis for the denial of the certificate of EEO compliance.

97. *Investigation Process.* The investigation process will consist of an examination of the information on the Form 395A and the Supplemental Investigation Sheet. The first step will be to evaluate the regular Form 395A information generally in accordance with the procedures and standards of the normal certification of EEO compliance process. However, we will not grant a certification of EEO compliance until we also have completed our examination of the responses to the inquiries on the Supplemental Investigation Sheet and have determined that these responses substantially verify the Form 395A report.

98. Once the evaluation of the regular Form 395A report is completed, we will examine the supplemental information. We will review the job descriptions requested in Part I of the Supplemental Investigation Sheet to determine whether the employee's duties and responsibilities are consistent with the job category in which the employee was reported. If any questions arise in this examination, we will ask the cable entity to provide additional information with respect to the employees' responsibilities and may also request additional job descriptions and information concerning the manner in which jobs/employees are assigned to the various categories. If necessary, we may conduct an on-site audit of the cable unit's employment statistics report. If, after further examination, we determine there are substantial deficiencies in the cable entity's reporting methods, lack of EEO performance, or effort as required under the Cable Act, we will take appropriate action, including poossible denial of certification and other sanctions as provided in the Cable Act and Section 1.80 of our rules.

99. We next will examine the responses to the questions concerning EEO practices and their conformance with requirements of the Cable Act. Any apparent deviations in the cable entity's EEO practices from the requirements of the Cable Act and/or our rules will be subject to further investigation, including

additional questions and, if necessary, an on-site audit of the cable unit's EEO practices and activities. If the further investigation reveals substantial deviation from the EEO requirements, lack of effort, or activity inconsistent with the EEO provisions of the Cable Act or our rules, we will take appropriate action. This may result in denial and certification, forfeiture, or other sanctions as provided under the Cable Act and Section 1.80 of our rules. If the information provided on Form 395A and in response to the inquiries on the Supplemental Investigation Sheet and any further requests or on-site audits indicates satisfactory compliance with the EEO requirements of the Cable Act, we will grant certification of EEO compliance.

100. We believe that this investigation process will provide us with sufficient data and information to assess whether the EEO practices of an employment unit are in compliance with the requirements of Section 634(b), (c) and (d) of the Cable Act. This procedure will limit the burden on the cable system and on the Commission to that which we believe is the minimum necessary to fully satisfy our obligations under the Cable Act.

D. On-site Audits

101. As stated in the House and Senate legislative reports, Congress intended that the Commission use random on-site audits as part of the process of determining compliance with the EEO provisions of the Cable Act. In particular, the legislative history states:

> in order to ensure compliance with this section, the Commission is directed to annually review the employment profiles of reporting employment units, including random on-site audits of some reporting units. These audits will provide the Commission with a basis for determining whether employment profiles are accurately reported on the required annual statistical employment reports, and whether job classification and employee responsibilities are accurately defined.[49]

In the *Notice*, the Commission proposed to conduct random-on-site audits on a more limited basis than the paper investigations. Due to the inherent costliness of conducting on-site audits, we proposed that these audits would be conducted only in response

[49] *See* 98th Cong. 2d Session 130 Cong. Rec. S14,286 (1984) and House Report at 91.

to problems that arose during the investigations procedure.

102. NCTA and ALF comment that random on-site audits are a reasonable approach for verification of the reported data and descriptions. These commenters, however, state that such audits should be kept to a minimum and used only when the paper investigation suggests the existence of a problem. ALF believes that on-site audits are a deterrent mechanism and should be used sparingly to preserve their effectiveness. The Joint Commenters and ALF note that on-site audits are not only costly to the Commission, but to the cable entity being audited. NCTA suggests that the Commission limit the number of units owned by a single MSO that can be audited during the company's year of investigation. NYC and BCFM state that the Commission should indicate how frequently and under what circumstances on-site audits will be conducted. The Joint Commenters, ALF and NCTA recommend that the Commission adopt guidelines for the conduct of on-site audits to ensure that they are handled fairly and efficiently. Among the suggested guidelines are notification of the intent to conduct an audit and notification of the intended scope and manner of the inquiry. Further, according to these parties, audits should not disrupt the cable entity's normal operations and system operators and their employees should be permitted to have counsel present.

103. NBMC asserts that the Commission should audit a specified percentage of cable systems that are randomly selected by lottery each year. Each system should be subject to an on-site audit once very five years, not necessarily the same year as the paper investigation. UCC/ACT believes that in addition to the audits conducted in response to problems, the Commission should conduct a specific number of random on-site audits each year. In UCC/ACT's view, if problems are evidenced during an on-site audit, a follow-up audit should be conducted within three years. UCC/ACT also suggests that the Commission establish criteria to determine the existence of problems.[50] NBMC states that the Commission should not be concerned with the inherent costliness of on-site audits. Rather the Commission should ask Congress for whatever funds are necessary to ensure that the Commission is

[50] UCC/ACT's criteria are failure to obtain certification three or more times in a seven-year period, evidence of problems in the five-year investigation and irregularities in either the annual Form 395A report or the Form 397 submission.

able to comply with the Cable Act.

104. We intend to concentrate our on-site auditing efforts on those situations that present problems during the paper investigation, as proposed. In particular, we believe on-site audits would be most effective for verification of a cable entity's classification of specific jobs in the various job categories. We believe that this approach will make the most efficient use of our limited resources. On-site audits, as we previously noted, are costly to conduct and are likely to be burdensome for the cable operator subject to this type of investigation. By directing our efforts toward those situations where there appear to be problems, we believe that we can be most effective in ensuring compliance with the EEO requirements of the Cable Act throughout the cable industry. Before the Commission conducts an on-site audit of an EEO unit, we intend to provide the cable operator with adequate notification. In general, on-site audits will be limited in scope, focusing on questions raised during our routine investigations. Further, we will attempt to conduct audits in a manner that will be least disruptive to the operator and employees of the cable system.

E. Multiple System Operators Reporting Agreements

105. In the *Notice*, we proposed to develop multiple system operators reporting agreements (MRAs). As proposed, these agreements would include:

(1) An analysis of each individual employment unit of the MSO (basically, this would consist of the regular Form 395A information);

(2) An understanding of how the employment units are organized and how the personnel policies and practices are administered (the *Notice* suggested that an organizational chart of the MSO might be appropriate for providing the necessary information);

(3) A complete listing of job titles with corresponding job category classifications and a brief general description of the job duties and responsibilities for each job title; and

(4) A description of internal audit systems, including forms for analyzing personnel actions and provisions for corrective measures where goals are not being met; and a description of methodology to calculate detailed goals that may be necessary to correct identifiable problem areas.

We indicated in the *Notice* that the MRAs would permit MSOs to file coordinated certification and investigation reports for all their employment units at one time. All employment units subject to certification or under investigation would then be reviewed within

the context of the MSO's total organizational data and pre-approved reporting format. While each employment unit of the MSO would still be required to meet its individual EEO obligations, we stated our belief that the MRA procedure would reduce the overall administrative costs of compliance and be beneficial for both the MSO and the Commission.

106. In general, the commenters support the MRA approach. EEAC supports the Commission's efforts to reduce recordkeeping and reporting burdens. UCC/ACT believes that the MRA would provide valuable structural, organizational and administrative information to the Commission and to the MSO for its annual certification. UCC/ACT also supports the listing of job titles, job category classifications and job responsibilities. NBMC, in its comments, states that the MRA is a laudable proposal requiring only minor fine tuning. In fact, NBMC believes that review of MSO company-wide performance should always be performed and supports requiring an MRA for any MSO with more than five systems. The Catholic Conference suggests that the MRAs be made available for public inspection.

107. The Cable Operators endorse the MRA proposal, but urge that it be an optional reporting procedure. The Cable Operators also suggest certain clarifications. NCTA supports the adoption of the MRA concept but suggests certain modifications. For example, NCTA opposes the proposed requirement that all cable entities submit job descriptions for their employees. NCTA suggests that the request for this information should be limited to only those units undergoing the periodic investigation. NCTA further is opposed to the use of the term "goals" in the MRA and its concomitant suggestion of numerical standards. NCTA also believes that all cable entities should be permitted to enter into special reporting agreements. Finally, NCTA requests clarification of the "pre-approved reporting format" language contained in the proposal. In this regard, NCTA supports the concept of allowing cable operators to establish a reporting format that accommodates their individual organizational structures and interests.

108. Centel suggests that the MRAs be limited to the five year investigation. The Joint Commenters agree that an MRA could serve a useful purpose; however, they believe that the MRA procedure proposed in the *Notice* is too burdensome. The Joint Commenters indicate that the Commission could develop a list of potentially useful information and that submission of this information could be left to the discretion of the MSO. According to

the Joint Commenters, the Commission would not routinely review the submitted information except in cases where the annual employment report or the Form 397 raise concerns. The Joint Commenters suggest that the Commission could then refer to the submitted information to determine whether those questions or concerns could be resolved without further inquiry. The Joint Commenters believe that this approach to the MRA would create a valuable, efficiency-promoting administrative tool for both the Commission and the cable entity.

109. After consideration of the comments, we believe that an MRA procedure would be beneficial to both the Commission and the cable industry. However, we agree with those commenters who believe that the proposed procedure would be excessively burdensome and conclude that it is necessary to modify the MRA procedure proposed in the *Notice* and to make it an optional arrangement.

110. *Purpose and Scope of the MRA.* We believe that the ability to consolidate the filing of EEO reports for all employment units, to coordinate the supplemental information for the units under investigation, and to review this information within the context of the MSO organizational make-up will be beneficial in reducing the administrative costs for both the MSO and Commission. However, we disagree with NBMC and other groups that have suggested that various MSOs should be required to file MRAs. Since the concept of an MRA is neither required nor contemplated by the Cable Act, but rather was intended to benefit the Commission and the MSO, we do not believe that mandatory MRAs would be desirable. Thus, an MSO will not be required to enter into an MRA. However, as discussed above, we believe such arranements would be cost-efficient for both MSOs and the Commission, and therefore, encourage MSO's to participate in the MRA program.

111. The principal purpose of the MRA is to establish an effective dialogue between an MSO and the Commission on EEO matters. The MRA will provide an arrangement under which an MSO can file consolidated EEO reports for all its employment units. In addition, the MRA will provide a mechanism for a coordinated review of the MSO's employment practices for the purpose of determining compliance with the EEO requirements of the Cable Act. In this regard, we envision that the MRA procedure, in general, will be used for both the annual certification

and the five year investigation of an MSO's employment units.[51]

112. Since the purpose of the MRA is to encourage a dialogue between the Commission and MSOs regarding the unique problems that MSOs face, we intend, in most instances, to review the MRA agreement annually. This systematic review will enable the Commission and the cable entity to identify problem areas. Furthermore, an annual review process will avoid the broad inquiries that might otherwise be necesssary.

113. With respect to the scope of the MRA, several commenters have indicated that MRAs should be available to both MSOs and independent operators. These commenters have stated that by limiting MRAs to multiple system operators we are depriving the independent cable operator of the benefits of being evaluated within the context of a greater range of information. We wish to make clear that independent operators, those operators with one system and filing one form, are not precluded from seeking the technical assistance otherwise afforded MSOs. We do believe that MSOs stand to benefit most from MRAs, insofar as we will allow them to coordinate the filing of certification and investigation reports for several employment units at one time. However, we also encourage individual operators to enter into reporting agreements to the extent that they provide the opportunity to submit additional information concerning the company's employment practices or good faith efforts.

114. *MRA Information.* Several commenters expressed concern that the MRA information proposed in the *Notice* was overly burdensome. NCTA, for example, expressed concern that the Commission might seek detailed information regarding how employment units are interrelated and how policies are administered. Many cable parties were concerned with the proposal that the MRAs include "(a) complete listing of job titles with job category classifications . . . . "

115. The Commission's intended purpose in developing the MRA procedure is to reduce, rather than increase, the administrative burden associated with complying with the EEO requirements of the Cable Act. We agree with the commenters that some of the information requested in the original proposal is unneces-

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[51] We believe that this is a reasonable approach since one of the provisions of the MRA will be to determine which of the MSO's employment units will be subject to investigation (*e.g.*, 20% per year). In this regard, the MRA would provide the information needed for both certification and investigation activities and would eliminate the need for the MSO to submit the additional information for its cable units that might be requested if the units were certified and investigated on an individual basis.

sary. Accordingly, we have amended the MRA procedure to make the information filing requirement as minimally intrusive as possible. At the same time, we believe that the new MRA procedure will allow us to collect sufficient information to perform our certification and investigatory responsibilities under the statute. In general, we envision that the principal filing requirement under an MRA will be the same as that for all cable entities, *i.e.*, FCC Form 395A. The MRA will be merely an administrative device to enable an MSO to coordinate and consolidate the filing of the necessary EEO information; to take into account the special aspects and nature of the MSO organizational structure; and to permit an orderly review of the MSO's EEO efforts by the Commission.

116. With repsect to corporate organizational information, we believe that it is important for the purpose of the MRA that the Commission be aware of how cable employment units are interrelated and how personnel policies are administered within the cable firm. Nevertheless, we can understand the concern with such a broad submission. Therefore, MRA agreements will permit MSOs to submit whatever information meets this end, and, in most instances, an organizational chart will be adequate.

117. Many cable operators oppose the proposal to include a complete listing of job titles and corresponding job category classifications in the MRA. The parties state that such a proposal would impose an enormous financial and administrative burden on MSOs. In order to impose the least burden on cable operators and still comply with the statutory requirements to review the accuracy of employment practices and job classifications reported in the annual report, we believe it generally would be sufficient for MSOs participating in the MRA program to submit job information for only three job titles. The categories from which these job titles are to be selected will be specified by the Commission. The job information should include a brief general description of the major duties and responsibilities of each job title. This modification should alleviate the concerns regarding the financial and administrative burden imposed on cable operators, the inability of the Commission to review this information, and the concerns regarding violation of employee privacy rights. In the case of MSOs that have been denied a certification of EEO compliance in one or more the previous five years, we may ask for additional job descriptions as described in the discussion of

Supplemental Investigation Sheets above.

118. *Internal audit system.* In the *Notice*, we proposed that the MRA include a description of how the MSO would monitor and analyze personnel actions. In addition, we proposed to collect information on provisions for corrective measures where goals are not being met and a description of methodology to calculate detailed goals that may be necessary to correct identifiable problem areas.

119. Several commenters strongly object to the use of the word "goals" in this proposal. NCTA suggests that the current language of the proposal be shortened to delete the goal language and that a statement be included that operators must submit with the MRA "a description of internal audit systems including forms for analyzing personnel actions and provisions for corrective measures." Inasmuch as we have no intention of imposing numerical quotas on cable operators, we believe that the edit proposed by NCTA is appropriate. Our concern is that the Commission receive information to determine whether procedures have been implemented to correct identifiable problems that may exist. Accordingly, the MRA will include only a description of how the MSO monitors and analyzes its peronnel actions.

120. *Implementation of the MRA.* A number of commenters have requested that the Commission clarify how it intends to implement an MRA agreement with an MSO. It is our desire to allow MSOs the flexibility to negotiate an MRA in a manner that is most convenient for their respective needs. In the usual case involving a large MSO, we would assume that the MSO representative initially would find it beneficial to discuss the MRA orally, in person or by telephone, with a Commission staff member. In any event, the initial discussion should be scheduled by January 1 of each year.

121. *Preliminary Discussion.* An MSO seeking to enter into a MRA initially will be assigned to an EEO Specialist who would be responsible for conducting a preliminary discussion. This discussion will center on how to review each individual employment unit's EEO performance with the context of its organizational structure. The outcome of this discussion will determine which employment units will be investigated and the extent of the investigations. Administratively, one-fifth of the employment units will be investigated annually. However, some flexibility will be provided to accommodate the individual structure of each MSO.

122. *Pre-Approved Reporting Format.* NCTA requests that the Commission clarify the proposal to allow cable operators to arrange "pre-approved reporting formats." Centel and others express a similar concern as to whether the MRA reporting format would be individually negotiated and would take into account the unique characteristics of each MSO. It is the Commission's intention to establish a reporting format that accommodates each MSO's unique characteristics. In this regard, the aspects of the reporting requirements that will be discussed are:

(i) The determination of which labor force data (*i.e.*, national vs. regional data) individual employment units must apply;

(ii) The unique characteristics of the cable entity's decentralized personnel practice;

(iii) Which employment units will undergo the formal investigation each year;

(iv) Whether a large MSO should file a single MRA or separate MRAs for regional units;

(v) A determination of the three job titles for which the MSO will submit a brief general description of duties and responsibilities; and

(vi) How to deal with individual employment units with deficient EEO programs, and how to bring these deficient units into compliance.

VI. Sanctions

123. Section 634(f) of the Cable Act provides sanctions for failure to comply with EEO requirements and outlines procedures to be used by the Commission when it believes that a sanction is warranted. Subsection (f)(1) specifies that if the Commission finds, after notice and hearing, that an entity has "willfully or repeatedly without good cause failed to comply with the requirements of [Section 634]," such a failure is a substantial failure to comply with the Cable Act.[52] Such a failure, in turn, is a basis for the nonrenewal of the system's franchise pursuant to Section 626(c)(1)(A).

124. Subsection (f)(2) specifies that any person who is determined by the Commission "to have failed to meet or failed to make best efforts to meet" the requirements of Section 634 or our cable EEO rules is liable to a forfeiture penalty of $200 per day for each violation. While there is a limit of 180 days for

[52] Repeatedly is defined as three or more times during any seven year period.

forfeitures accruing prior to notification by the Commission of a potential violation, there is no limit regarding violations that continue after the issuance of such notification. In addition, subsection (f)(2) authorizes the Commission to suspend one or more of a violator's cable auxiliary relay service (CARS) licenses until the violation is corrected.[53] Only one violation of the cable EEO provisions is specifically defined, namely a misrepresentation occurring in connection with an application for certification.

125. Subsection (f)(3) specifies that certain parts of the Commission's existing statutory authority respecting the issuance of a forfeiture penalty shall apply to cable EEO forfeitures. Subsection (f)(4) directs the Commission to provide notice to the public and appropriate franchising authorities of any penalty imposed.

126. In the *Notice*, we noted that Section 1.80 of our rules sets forth both the amounts of forfeiture and the procedures to be followed before a forfeiture can be imposed. We expressed our belief that because Section 1.80(a) states that "[a] forfeiture penalty assessed under this section is in addition to any other penalty provided for by the Communications Act," no change in our rules was necessary.

127. Commenters express concern over certain language in this section and the lack of specificity as to when penalties are applied. NYC claims there is no definition of "failure" to make best efforts to meet standards or whether "willful" violations are required before the FCC imposes penalties. The Joint Commenters and NCTA are concerned that Section 634 of the Cable Act has the potential to exact penalties over and above those provided for in Section 1.80 of the Commisison's rules. They believe cable entities could, therefore, be penalized twice for the same infraction.

128. In accordance with Section 634(f)(1) of the Cable Act, the Commission will consider any willful or repeated without good cause failure to comply with the EEO provisions of Section 634, or our rules, to be a substantial failure to comply with the Cable Act. Any such failure to comply may constitute a basis for the imposition of a forfeiture or a suspension of a CARS licenses. The amount of the forfeiture will be limited by the provisions of Section 634(f)(2) of the Cable Act. Before a forfeiture or suspension is imposed, we will follow the procedures for notification and hearing in Section 1.80(e) *et seq*. Further, Section 1.80 of our rules

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[53] Section 634(i)(2) states that the remedies and enforcement provisions of Section 634 are in addition to any other penalty available under the Communications Act or any other law.

will be modified to exclude EEO violations from the monetary limits for forfeitures in accordance with the provisions of the Cable Act.

VII. EEO COMPLAINT PROCEDURES

129. In the *Notice*, we noted that the Commission has experience in EEO complaint procedures dealing with broadcast licensees. We proposed to invoke similar procedures involving discrimination complaints against cable entities. In this regard, the Commission has a formal *Memorandum of Understanding* (*MOU*) with the EEOC regarding the exchange of information and the disposition of discrimination complaints involving broadcast licensees.[54] The *MOU* establishes a procedure for the orderly exchange of information between the FCC and the EEOC and a process for the investigation and resolution of complaints of employment discrimination against broadcast licensees.[55] We proposed to modify the MOU to include cable operators and multiple system operators. In addition, we proposed the addition of a prohibition against age discrimination to comport with the provisions of the Cable Act. Since the amended MOU provides for the orderly exchange of information for the investigation and resolution of discrimination complaints involving cable operators, we also proposed to eliminate from our rules Section 76.311(h), *Report of Complaints*. This section provides that every employment unit submit an annual report to the Commission indicating whether any complaints have been filed regarding violations of equal employment statutes by a cable operator.

130. Of the parties who commented on this section, most favor our proposals regarding complaint procedures and the modifications to the *MOU*. However, several parties request clarification of various aspects of the complaint procedures. NCTA would have the FCC explain procedures for processing complaints of EEO violations as described in paragraph 42 of the *Notice*. NCTA, the Joint Commenters and the Cable Operators want the Commission to review all complaints for strict compliance with the adopted

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[54] *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978).

[55] For a general description of the EEOC's statutory authority, *see id.* at 2321 n. 2. The EEOC's jurisdiction extends to employers with 15 or more employees, while the jurisdiction of a state or local agency may be broader in scope. Further, to be timely, a charge must be filed with the EEOC within 180 days of the alleged unlawful employment practice, except as otherwise noted in 29 CFR § 1601.13.

requirements and swiftly dismiss those complaints that fail to meet those requirements. These parties are especially concerned with "interested" party status regarding EEO complaints. NCTA claims that charges must be substantial and detailed and that it should be made clear that interested parties have standing and specificity of evidence and must supply affidavits of personal knowledge of the complaint. NCTA also contends that complainants must be made aware that false statements are made punishable so as to discourage frivolous complaints and that alleged violations must be filed within 180 days. NAMIC proposes to delete the time limit for filing complaints.

131. The Catholic Conference suggests that anyone filing a complaint that fails to comply with the adopted requirements be given a plain English explanation of the rules and allowed to resubmit the complaint in proper form. In addition, the Commission should develop a "Cable EEO and Complaint Procedures Manual." This manual should be provided to cable operators for their public files.

132. The Joint Commenters note that the Commission stated that it intended to add cable operators and multiple system operators to the *MOU*. They ask that the Commission clarify that this does not mean that filing a complaint against a single system of an MSO will trigger an investigation of all of that MSO's systems.

133. Section 634(g) of the Cable Act establishes certain restrictions relating to the filing of EEO complaints. It provides that complaints shall be in writing and shall be signed and sworn to. In addition, it limits the fling of complaints to "employees or applicants for employment" and "any other interested person." To the extent these requirements are unclear, some useful guidance may be obtained from the parallel provisions of Section 309(d)(1) of the Communications Act and from the decisions interpreting that section, including in particular *Office of Communications of the United Church of Christ v. FCC*, 359 F. 2d 944 (1966). The standing of employees and job applicants under Section 634(g) is clear. The basic holding of *UCC v. FCC* is that any person may establish standing to participate as a party in interest by alleging a threatened or actual injury will be personally suffered that is likely to be prevented or redressed by a favorable decision. *UCC v. FCC* makes it clear that consumers may be included within this group. These precedents also appear to be the origin of the requirement that all allegations must be supported by an affidavit of a person or persons with personal

knowledge of the facts recited. The Commission established that any individual may qualify as a party in interest if he alleges that he is a listener or viewer of the broadcast station in question or that he resides within the station's service area. An organization may establish standing to represent the interest of local listeners or viewers. To do so, it must provide the affidavit of one or more individuals entitled to standing indicating that the group represents local residents and that the petition is filed on their behalf. Given this precedent, a party in interest to a formal cable EEO complaint shall be anyone, or group representing said person, residing within the cable system's franchise area who alleges noncompliance and, according to the Cable Act, signs and swears to a written description of the allegations. We will not process formal complaints which do not meet these requirements. Thus, if a complaint does not allege facts raising a *prima facie* question of noncompliance with the statute or our rules, we will notify the complainant that the matters alleged do not warrant further action or inquiry on our part.[56] On the other hand, where a complaint does raise a *prima facie* question of noncompliance, we will submit it to the cable entity for a response. The Commission will then evaluate the submissions and determine what, if any, action is appropriate. Furthermore, since all that is required to file an EEO complaint is to submit a written, sworn to and signed statement, we see no need to develop a "complaint procedures manual" as the Catholic Conference has suggested. Such a manual would merely be repetitive of this section.

134. The Joint Commenters, the Cable Operators and NCTA suggest that all charges be timely filed with the Commission. These parties suggest a 180 day time limit to file charges of discrimination. In this regard, the Commission has considered previously a 180-day time limit for EEO complaints involving broadcasters.[57] There, the Commission noted that although such a time limit might be desirable "as a safeguard against faded memories, lost records, and dispersed witnesses," the time limit for accepting discrimination complaints was not adopted because of the importance of considering performance in the EEO area throughout the license term of the broadcaster. In the context of Section 634(g) of the Cable Act, however, we believe that a 180 day time limit is warranted. Title VII of the Civil Rights Act, the

[56] This does not preclude or limit the Commission from consideration, on its own motion, of any information concerning EEO noncompliance that is brought to its attention on an informal basis.

[57] *Report and Order*, Docket 20550, 60 FCC 2d at 226 (1976).

principles of which the Congress has indicated that we should follow here, contains such a limit and we see no reason why that policy should not be followed for complaints filed under the Cable Act. Thus, specific EEO complaints under Section 634(g) of the Cable Act must be filed within 180 days of the alleged act of discrimination or non-compliance with the provisions of the statute.

135. With respect to the *MOU*, the EEOC, in its comments, has agreed to revise the *MOU* with certain modifications to include cable system operators and to include a prohibition against age discrimination as proposed in the *Notice*. With respect to the concerns raised by multiple system operators, extension of the *MOU* to cable system operators does not mean that a complaint filed against an affiliated cable system will automatically trigger an investigation of all of the MSO's cable systems. Such an investigation would occur only upon a determination that an affiliated cable system's violation of EEO standards are reflective of the MSO's policy.

136. After discussions with the EEOC, the Commission and the EEOC have also agreed to amend Section V of the *MOU* to enhance coordination and cooperation between the agencies on EEO matters. Under the new provisions of Section V of the *MOU*, the Commission will confer, to the extent legally permitted, with the EEOC prior to Commission action on non-restricted EEO rule making proceedings. In general, this action will permit the disclosure by Commission staff of non-restricted rule making items, such as notices of inquiry, notices of proposed rule makings, and certain reports and orders, to the EEOC prior to Commission action on such items.[58] In taking this action, the Commision notes that the provisions of Section 1.1231 of its rules and all other *ex parte* restrictions remain in effect. In addition, the EEOC will be prohibited from disclosing the contents of any pre-coordinated Commission item.[59] Furthermore, nothing in the *MOU* affects the Commission's independence in making its own policy determinations. We believe that these changes to the *MOU* will permit a more orderly exchange of information between the Commission and the EEOC and permit a more effective

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[58] Such disclosure by authorized Commission employees will be exempt from the provisions of Section 19.735-206 of the Commission's rules. Disclosure of reports and orders will not be made when the EEOC is a party to the proceeding.

[59] *See* Paper Work Reduction Act, 44 USC Section 3510(b).

Federal policy in this area.

137. Since we are adopting the attached *MOU*, we find that Section 76.311(a) *Report of Complaints* is no longer necessary and will, therefore, delete this section from our rules. This section provided that every employment unit submit an annual report to the Commission indicating whether any complaints have been filed regarding violations of equal employment statutes by a cable operator. Under the MOU, such information is and will continue to be provided directly to the EEOC to the Commission on a regular basis.

VIII. CONCLUSION

138. By this *Report and Order*, the Commission is amending its rules to implement the equal employment opportunity provisions of the Cable Communications Policy Act of 1984. These rules set forth the policies and program obligations that the Cable Act requires cable operators to observe in order to comply with the Cable Act and to ensure equal employment opportunities. This *Report and Order* also establishes the procedures the Commission will use to monitor EEO performance and compliance with the statute.

IX. REGULATORY FLEXIBILITY FINAL ANALYSIS

139. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need for and purpose of the rules.*

The Cable Communications Policy Act of 1984 establishes guidelines for the regulation of equal employment opportunity policy and practices in the cable industry. The Cable Act directs the Commission to take the appropriate action in these areas in order to promote a national policy to encourage employment opportunities for women and minorities and to ensure non-discrimination in the cable industry. As a result of this mandate, we have eliminated some rules, modified others and promulgated new rules.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment,*

and changes made as a result.

A. Issues Raised.

The Equal Employment Advisory Council (EEAC) suggested that this rule could create multiple reporting obligations for those entities also subject to Executive Order No. 11246. The EEAC recommends that the Commission permit compliance determinations with respect to the FCC EEO standards to be made on the basis of a review of a cable entity's affirmative action program prepared pursuant to Executive Order No. 11246.

B. Assessment.

Cable entities do not routinely file affirmative action program information under Executive Order No. 11246. This information is only provided by an entity upon request. Therefore, we do not believe that duplication of reporting obligations occur. Howver, to the extent such information is duplicative of our requirements, we would accept copies of such affirmative action program statements for our purposes.

C. Changes made as a result of such comments.

None.

III. *Significant alternatives considered and rejected.*

The Commission considered all the alternatives presented in the *Notice* and considered all the timely filed comments directed to the various issues in the *Notice*. After carefully weighing all aspects of this proceeding, the Commission has adopted the most reasonable course of action under the mandate of the Cable Act.

140. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and the Cable Communications Policy Act of 1984, Parts 1 and 76 of the Commission's Rules and Regulations ARE AMENDED as set forth in the attached Appendix A. Pursuant to the requirements of Section 634(d)(1) of the Cable Communications Policy Act of 1984 and the authority contained in the Administrative Procedure Act, 5 U.S.C. § 553(d)(3), these rules and regulations ARE EFFECTIVE September 25, 1985. The forms and information collection requirements adopted herein are subject to Office of Management and Budget approval pursuant to the procedures specified in the Paperwork Reduction Act of

1980, 44 U.S.C. Chapter 35.

141. IT IS FURTHER ORDERED that the Memorandum of Understanding between the Equal Employment Opportunity Commission and the Federal Communications Commission as set forth in the attached Appendix D IS ADOPTED and will become effective thirty days after signature by both parties.

142. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendixes B–D-may be seen in FCC's Dockets Branch, 1919 M Street, N.W., Washington, D.C. 20554

APPENDIX A

47 CFR Parts 1 and 76 are amended to read as follows:

1. The authority citation for Parts 1 and 76 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 1.80 is amended by revising subparagraphs (b)(2)(i) and (b)(2)(ii) and adding subparagraph (b)(2)(iii) to read as follows:

§ 1.80 Forfeiture proceedings.

* * * * *

(b)(2) * * *

(i) $20,000, if the violator is a common carrier subject to the provisions of the Communications Act, a broadcast station licensee or permittee, or a cable television system operator except for EEO violations, and the violation relates to operation of those facilities.

(ii) $5,000, in the case of any other violator, and

(iii) no limit on EEO violations for cable operators.

* * * * *

3. 47 CFR 76.12 is amended by deleting paragraph (g) in its entirety

4. 47 CFR Part 76 is amended by adding a new Subpart E, entitled Equal Employment Opportunity Requirements, to read as follows:

Subpart E—Equal Employment Opportunity Requirements

§ 76.71 Scope of application.

(a) The provisions of this subpart shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system. Cable entities subject to these provisions include those systems defined in Section 76.5(a) of the rules and all satellite master

antenna television systems serving 50 or more subscribers.

(b) *Employment units.* The provisions of this subpart shall apply to cable entities as employment units. Each cable entity may be considered a separate employment unit; however, where two or more entities are under common ownership or control and are interrelated in their local management, operation, and utilization of employees, they shall constitute a single employment unit.

(c) *Headquarters office.* A multiple cable operator shall treat as a separate employment unit each headquarters office to the extent the work of that office is primarily related to the operation of more than one employment unit as described in paragraph (b) of this section.

§ 76.73 General EEO policy.

(a) Equal opportunity in employment shall be afforded by each cable entity to all qualified persons, and no person shall be discriminated against in employment by such entity because of race, color, religion, national origin, age or sex.

(b) Each employment unit shall establish, maintain, and carry out a positive continuing program of specific practices designed to assure equal opportunity to every aspect of cable system employment policy and practice. Under the terms of its program, an employment unit shall:

(1) Define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, age or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, age or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

§ 76.75 EEO program requirements.

An employment unit's equal employment opportunity program should reasonably address itself to the specific areas set forth below, to the extent possible and to the extent that they are appropriate in terms of employment unit size, location, etc.:

(a) Disseminate its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business. For example, this requirement may be met by:

(1) Posting notices in the employment unit's office and places of employment informing employees, and applicants for employment, of their equal employment opportunity rights, and their right to notify the Equal Employment Opportunity

Commission, the Federal Communications Commission, or other appropriate agency, if they believe they have been discriminated against. Where a significant percentage of employees, employment applicants, or residents of the community of a cable television system or the relevant labor area are Hispanic, such notices should be posted in Spanish and English. Similar use should be made of other languages in such posted equal employment opportunity notices, where appropriate;

(2) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion, national origin, age or sex is prohibited and that they may notify the Equal Employment Opportunity Commission, the Federal Communications Commission, or other appropriate agency if they believe they have been discriminated against.

(b) Use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals when job vacancies are available in its operation. For example, this requirement may be met by:

(1) Placing employment advertisements in media that have significant circulation among minority-group people in the recruiting area;

(2) Recruiting through schools and colleges with significant minority-group enrollments;

(3) Maintaining systematic contacts with minority and human relations organizations, leaders, and spokesmen to encourage referral of qualified minority or female applicants;

(4) Encouraging current employees to refer minority or female applicants;

(5) Making known to the appropriate recruitment sources in the employer's immediate area that qualified minority members and females are being sought for consideration whenever the employment unit hires.

(c) Evaluate its employment profile and job turnover against the availability of minorities and women in its franchise area. For example, this requirement may be met by:

(1) Comparing composition of relevant labor area with the composition of the entity's employees;

(2) Comparing its employees, within each job category, with the people available for such positions;

(3) Where there is underrepresentation of either minorities and/or women, examining the company's personnel policies and practices to assure that they do not inadvertently screen out any protected group and take appropriate action where necessary.

Note: These data are generally available on a metropolitan statistical area (MSA), primary metropolitan statistical area (PMSA) or county basis.

(d) Undertake to offer promotions of minorities and women in a nondiscriminatory fashion to positions of greater responsibility. For example, this requirement may be met by:

(1) Instructing those who make decisions on placement and promotion that minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation

should be reviewed to determined whether this results from discrimination;

(2) Giving minority groups and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counselling, and effective measures to enable employees with interest and potential to qualify themselves for such positions;

(3) Providing opportunity to perform overtime work on a basis that does not discriminate against qualified minority group or female employees.

(e) Encourage minority and female entrepreneurs to conduct business with all parts of its operation. For example, this requirement may be met by:

(1) Recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests.

(f) Analyze the result of its efforts to recruit, hire, promote, and use the services of minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

(1) Where union agreements exist, cooperating with the union or unions in the development of programs to assure qualified minority persons or females of equal opportunity for employment, and including an effective nondiscrimination clause in new or renegotiated union agreements;

(2) Avoiding use of selection techniques or tests that have the effect of discriminating against qualified minority groups or females;

(3) Reviewing seniority practices to ensure that such practices are nondiscriminatory;

(4) Examining rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race or sex discrimination.

§ 76.77 Reporting Requirements.

(a) *Annual employment report.* Each employment unit with six or more full-time employees shall file an annual employment report (FCC Form 395A) with the Commission on or before May 1 of each year. Employment data on the annual employment report shall reflect the figures from any one payroll period in January, February, or March of the year during which the report is filed. Unless instructed otherwise by the FCC, the same payroll period shall be used for each successive annual employment reports.

(b) *Certification of Compliance.* The Commission will use the information submitted on Form 395A to determine whether cable systems are in compliance with the provisions of this subpart. Cable systems found to be in compliance with these rules will receive a Certificate of Compliance.

(c) *Investigations.* The Commission will investigate each cable system at least once every five years. Cable systems are required to submit supplemental

investigation information with their regular Form 395A reports in the years they are investigated.

§76.79 Records available for public inspection.

(a) A copy of every annual employment report, and any other employment report filed with the Commission, and complaint report that has been filed with the Commission, and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the cable entity and the Commission pertaining to the reports after they have been filed in all documents incorporated therein by reference, unless specifically exempted from the requirement, are open for public inspection at the offices of the Commission in Washington, D.C.

(b) Every employment unit shall maintain for public inspection a file containing copies of all annual employment reports. Each document shall be retained for a period of five years. The file shall be maintained at the central office and at every location with more than five full-time employees. A headquarters employment unit file and a file containing a consolidated set of all documents pertaining to the other employment units of a multiple cable operator shall be maintained at the central office of the headquarters employment unit. The cable entity shall provide reasonable accommodations at these locations for undisturbed inspection of his equal employment opportunity records by members of the public during regular business hours.

5. 47 CFR 76 is amended by deleting Section 311 in its entirety.

6. 47 CFR 76.403 is amended by revising it to read as follows.

§ 76.403 Cable television system reports.

The operator of every operational cable television system shall correct and/or furnish information in response to forms, encompassing each community unit, mailed to said operator by the Commission. These include:

Community unit data	"Annual Report of Cable Television System," Form 325, Schedule 1.
Physical system data	"Annual Report of Cable Television System," Form 325, Schedule 2.
Operator ownership data	"Annual Report of Cable Television," Form 325, Schedule 3 and 4.

These forms shall be completed and returned to the Commission within 60 days after the date of mailing by the Commission.

Note: The operator of a cable television system having fewer than 1000 subscribers shall only be required to file Schedules 1 and 2 of Form 325 for each community unit.

STATEMENT OF COMMISSIONER DENNIS R. PATRICK DISSENTING IN PART

In re: Amendment of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable

Communications Policy Act of 1984 (MM Docket No. 85-61).

For the most part, I support this item. The Commission is adopting rules in this Report & Order to implement fully and faithfully the Cable Communications Policy Act of 1984 (the "Cable Act"). My fellow commissioners and I agree on the two-fold goal of that statute: first, to prohibit discrimination in employment and promotions by a cable entity; second, to ensure that cable entities have EEO programs which comply with the statute in all particulars and ensure continuing affirmative efforts to expand the pool of qualified minority and female applicants from which the cable company hires and promotes. I enthusiastically support these goals.

The majority asserts that it intends an EEO compliance certification process which will focus upon efforts, not impose numerical quotas. I agree that a focus upon efforts is required both by the Cable Act and by policy considerations. Nowhere in the Cable Act did the Congress require that cable companies achieve a certain numerical apportionment by race or sex. Nowhere in the Cable Act is a given set of *results* required. Indeed, the Congress considered and deleted a proposed section which would have expressly incorporated specific percentage figures in the Cable Act as a "processing guideline." Rather, the Cable Act on its face requires nondiscrimination and continuing affirmative *efforts* to identify qualified minorities and women for hiring and promotion.

A focus upon efforts, not results, is also compelled by policy considerations. Numerical quotas encourage employment decisions based upon race or sex rather than qualifications. In a word, quotas encourage discrimination—the very conduct the Cable Act seeks to eradicate. Equally distressing, however, is the fact that numerical quotas can be used as a "safeharbor" by those who achieve the numerical goal and, thereafter, lessen affirmative action efforts. There is nothing magic about achieving 50% of parity, for instance. It was not the intent of Congress, nor is it our intent, that companies whose employment profile exceed 50% of parity be able to cease EEO efforts. The statute requires continuing EEO programs by all cable companies.

Thus, I share the majority's objectives of prohibiting discrimination, requiring aggressive affirmative action, and using efforts rather than numerical quotas as the benchmark for compliance. I differ with the majority as to the most effective means of

achieving these objectives.

Specifically, I disagree with the majority's incorporation of "processing guidelines" into the EEO compliance certification process. Under the Commission's existing cable EEO processing criteria, a cable company with 11 or more employees does not satisfy the Commission's processing guidelines "where review of the most recent Annual Employment Report reveals that minorities and/or women are not employed on a full-time basis at least at a ratio of 50 percent of their availability in the labor force with respect to all full-time jobs and at a ratio of 50 percent of their availability with respect to full-time jobs in the upper-four job categories."[1]

The numbers adopted as processing guidelines will play a pivotal role in the certification process adopted by this item. So long as a cable company completes Form 395A, has not been named in an EEO complaint relating to the certification period, and has checked the affirmative boxes of Form 395A (indicating compliance with the Cable Act's requirements), it will be certified as in compliance with the Act *if* it employs minorities and women in *numbers* which meet or exceed the processing guidelines. If a cable company does not pass the processing guidelines element of the certification test, the majority decision provides that "other information" with respect to the cable entity's "efforts" will be examined. Paradoxically, however, the majority's Form 395A requires no "other information" except data as to the *numbers* of minorities and women hired or promoted in the preceding twelve months. (The cable entity can volunteer information.) Thus, despite the majority's assertions that its focus will be upon efforts, a cable company failing to achieve the *numerical* goal overall is subjected to further scrutiny with respect to *numerical* results achieved within the preceding twelve months.

The industry will not review the fine print of our Report & Order, in which we assert that it is really efforts, not numbers, upon which we will focus. Industry members will perceive, correctly, that achieving "50% of parity" is a key element of the test.[2] To the extent that this perception encourages those below

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[1] Public Notice No. 1364 (December 15, 1983).

[2] Indeed, it appears that even the trade press in Washington perceives the 50% processing guidelines adopted by the majority to be the key element of the new test for EEO compliance. *Broadcasting* magazine summarized the majority's decision as follows:

> FCC has adopted rules implementing EEO aspects of Cable Communications Policy Act of 1984 [citation omitted]. It decided to use processing guidelines to monitor cable EEO compliance. As result, cable entities (and satellite

parity to discriminate on the basis of race or sex in hiring decisions, or encourages those above parity to relax their EEO efforts, the processing guidelines will work *against* the very goals of the Cable Act: to prohibit discrimination and to encourage affirmative action efforts regardless of the cable entity's numerical profile at any given time.

I do not object to the use of numerical guidelines for internal administrative purposes. As a result of limited staff resources, the Commission may be unable to scrutinize thoroughly the EEO efforts of every cable company every year. As such, we may choose to allocate our scarce staff resources by examining first the EEO efforts of companies with the fewest minority and female employees in relation to their labor markets.

However, in order to maximize the likelihood that the processing guidelines are in practice no more than what we wish them to be in theory (*internal* guidelines used to allocate those entities with a higher likelihood of insufficient efforts and inadequate EEO programs), I would make some fundamental changes to the majority's approach. First, while I would not make a secret of our administrative procedures, I would not formally incorporate a numerical parity guideline into the certification process. A numerical figure would not, therefore, be formally announced or published by the FCC to the industry. Second, I would not promise the industry that, absent a formal rulemaking, the parity figure will remain the same. (By formally incorporating the parity guidelines into our certification process in the Report & Order, the majority's decision has just this effect.) Quite to the contrary, I would expect that under my approach, the parity figure used for internal administrative purposes could be raised over time as staff resources permitted or as industry EEO statistics improved.

The significance of these changes is that they would alter the signal we send to the industry. Under the majority's approach, the industry will understand that only companies below 50% of parity are subjected to further scrutiny on an annual basis, and will act accordingly. Those companies below the numerical goal may discriminate on the basis of race or sex to reach the parity figure; those above the goal may slacken their EEO efforts. Under

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master antenna television operators) serving 50 or more subscribers and having six to 10 full-time employes *must have 50% parity* with labor force overall and 25% parity in top four job categories; those same types of entities with 11 or more full-time employes *must have 50% parity* with labor force overall and in top four job categories.

"Where Things Stand," *Broadcasting*, October 7, 1985, p. 69. (emphasis added).

my approach the industry should learn that we have not adopted any hard and fast numbers that trigger review and that whatever guidelines we use internally this year may change next year. Every company should understand that certification is not assured absent continuing efforts which comply with the Cable Act in all regards.

As I noted initially, my fellow commissioners and I share a common objective, but we differ as to the most effective means of realizing it. We share a desire to implement the letter and spirit of the Cable Act faithfully, to eradicate sex and race discrimination from hiring and promotion decisions, and to ensure continuing, aggressive EEO programs. But the means we choose to realize these objectives implicate issues of grave importance. For the legal and policy reasons noted above, I believe our certification program should focus upon ensuring that every cable company, regardless of its employment profile at the moment, is making ongoing, aggressive EEO efforts which comply with the requirements of the Cable Act. By formally incorporating our processing guidelines into our EEO compliance certification process, the majority's plan will focus attention, instead, upon numerical results. To the extent that this focus on numbers encourages hiring decisions based on race or sex or appears to insulate companies already above parity, it will disserve the objectives of the Cable Act. In the long run, I believe it will also disserve the interests of minorities and women seeking equal employment opportunities in the cable industry.

For these reasons, I respectfully dissent in part.

Common Carrier, Computer II
Customer Premises Equipment
Separate Subsidiary

Proceeding initiated to determine whether to relieve AT&T from Computer II requirement that it provide customer premises equipment only through subsidiary structurally separated from common carrier operations, and if so, what non-structural safeguards should apply. In addition, requested waiver of Computer II rules granted to permit affiliates within AT&T to share use of proprietary software; waiver requested to facilitate provision of customer premises equipment to federal government found to be unnecessary.
—*AT&T Co.*
CC Docket No. 85-26

FCC 85-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company	CC Docket 85-26
American Telephone & Telegraph Company, Petition for Relief from Structural Separation Requirements	ENF 84-17
American Telephone & Telegraph Company, Petition for Temporary Waiver of the Computer II Rules Concerning the Provision of Customer Premises Equipment to the Federal Government	ENF 84-43

American Telephone & Telegraph Company Request to Permit AT&T Technologies, Inc. to Provide Personnel-Related Services to AT&T Information Systems, Inc.	ENF 84-56

MEMORANDUM OPINION AND NOTICE OF PROPOSED RULEMAKING

Adopted January 31, 1985; Released: February 22, 1985

BY THE COMMISSION:

I. INTRODUCTION

1. The American Telephone and Telegraph Company (AT&T) has filed petition seeking relief from structural separation requirements imposed upon it in the *Second Computer Inquiry (Computer II)*[1] regarding its provision of customer premises equipment (CPE) and enhanced services. AT&T's petition[2] and other pleadings cite fundamental changes in its operations and in the telecommunications industry in general since the *Computer II* rules were adopted. We hereby give notice that we are proposing to relieve AT&T from structural separation requirements for the provision of CPE. We invite comments on this proposal, as well as on any other issue which arises as a result of actions described in this order or in relevant pleadings filed by AT&T. We are deferring until a later proceeding the issue of whether AT&T's provision of enhanced services should continue to be subject to structural separation.

A. Summary

2. In *Computer II* the Commission permitted AT&T to engage in the provision of CPE and enhanced services only through a

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (Final Decision), *reconsideration*, 84 FCC 2d 50 (1981), *further reconsideration, 88 FCC* 2d 512 (1980), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983), *second further reconsideration*, FCC 84-190 (released May 4, 1984).

[2] AT&T Petition for Relief from Structural Separation Requirements, filed April 30, 1984, File No. ENF 84-17.

separate subsidiary. That subsidiary was required to operate independently from the remainder of the corporation and to comply with specific structural, financial, and accounting requirements and information flow restrictions. The Commission adopted these requirements to lessen the likelihood that AT&T's provision of CPE and enhanced services would result in harm to competition in those markets or cause ratepayers to fund CPE and enhanced services operations.

3. AT&T has undergone fundamental changes in its corporate structure as a result of the Modified Final Judgement (MFJ)[3] and market changes in the telecommunications industry. As described herein, we seek to ensure that our regulations impose the minimum restrictions necessary to achieve the Commission's goals. Specifically, we propose to remove the structural separation conditions from AT&T's provision of CPE. We are not, however, at this juncture, addressing the possible removal of structural separation for AT&T's offering of enhanced services, for we wish to address enhanced services issues in a separate proceeding. Regardless of our proposal to remove structural separation conditions from AT&T's provision of CPE, we remain concerned that permitting AT&T to engage in the unseparate provision of CPE might hinder the ability of nonaffiliated providers of CPE to obtain timely information regarding changes to the manner in which CPE is connected or operates with the network. We also remain concerned that the total amounts of funds which AT&T infuses into CPE and other unregulated operations not adversely affect ratepayers. We therefore seek suggestions from interested parties as to means less restrictive than structural separation to address these and other potential drawbacks of relieving AT&T from structural separation requirements for its provision of CPE.

4. In addition, in this order we grant AT&T a waiver of Section 64.702(c)(4) of our Rules to permit its unregulated affiliates to engage in the unrestricted use of proprietary software on a fully cost compensatory basis, and grant AT&T's request of August 28, 1984, to permit AT&T Technologies to provide personnel and recruiting services to its separated affiliate, AT&T Information Systems, Inc. (ATTIS).[4] We deny AT&T's request for a temporary waiver of the *Computer II* rules to permit ATTIS to provide

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[3] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[4] Letter from D. J. Culkin to Chief, Common Carrier Bureau, received August 28, 1984, File No. ENF 84-56.

computer support to AT&T Technologies for the provision of CPE to the federal government.[5]

B. Background

5. In the *Second Computer Inquiry* the Commission established certain policies regarding the provision of enhanced services and CPE by all common carriers. These policies include promoting cost-based pricing for regulated offerings, protecting ratepayers from adverse consequences of carrier provision of competitive CPE and enhanced services offerings, and promoting an environment in which all vendors of CPE and enhanced services may compete without unfair advantage. We remain committed to these policies. In this proceeding we address the issue of whether they can in some instances be promoted by means other than the structural separation imposed in *Computer II.*

6. The *Computer II* structural separation requirements were adopted with several objectives. They are intended to control AT&T's ability to cross-subsidize competitive offerings with revenues derived from monopoly communications services, while insulating ratepayers from liabilities incurred by AT&T's unregulated ventures. They are also designed to ensure that competing providers of unregulated products and services receive equal interconnection of their offerings to the basic services network, and to ensure that the basic transmission network remain a clear channel over which all services, whether basic or enhanced, could flow unimpeded.[6] The *Computer II* rules prohibit AT&T and its *Computer II* subsidiary, whose initial and modified capitalization is subject to Commission approval, from, among other things, jointly marketing, installing and maintaining, and billing for products and services, and places conditions on their exchange of network-related and customer proprietary information. AT&T is prohibited from developing software-based products exclusively

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[5] Petition of American Telephone and Telegraph Company for Temporary Waiver of Section 64.702 of the Commission's Rules With Respect to the Provision of CPE to the Federal Government, filed July 17, 1984, File No. ENF 84-43.

[6] The *Computer II* rules define enhanced services as "services, offered over common carrier facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a). Basic services are those in which a carrier offers a pure transmission capacity between two or more points "over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Final Decision*, 77 FCC 2d at 419-20.

for the separate subsidiary but may develop "generic" software for sale to third parties on the same terms and conditions as are offered to the subsidiary. The subsidiary must compensate affiliates for research and development performed on its behalf. Like all other carriers which engage in the provision of enhanced services, AT&T's subsidiary must maintain separate books of account for its unregulated activities and may obtain basic services from an affiliated carrier only at tariffed rates. The Commission has permitted affiliates to provide ATTIS with certain types of administrative services as specified in Commission decisions.

7. At the time these requirements were adopted, the Bell System was a vertically integrated company with assets estimated at $150 billion, and annual revenues that exceeded $69 billion in 1983. Prior to divestiture, AT&T provided exchange communications services through 22 wholly-owned and two partially-owned operating companies which operated more than 80% of the intrastate network, as well as interexchange services and CPE, which was generally provided as part of a bundled tariffed offering. At the time the *Computer II* decisions were adopted we found competition in the provision of CPE to be at a formative stage. AT&T also owned research, development and manufacturing facilities covering both network and customer premises equipment, the funds for which were largely derived from sales to affiliates which provided monoply regulated services.

8. Since the *Computer II* decisions, however, fundamental changes in the structure of AT&T and the telecommunications industry in general have occurred. The most significant of these has been the divestiture of the Bell Operating Companies (BOCs) from AT&T pursuant to the MFJ. As a consequence of divestiture, AT&T is no longer engaged in the provision of local exchange telephone service. The MFJ permits AT&T, however, to enter almost any other line of business it chooses.[7] The BOCs, on the other hand, while barred from the provision of interexchange services and from manufacturing operations by the MFJ, have been permitted to provide CPE.[8] All of the BOCs have entered

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[7] The MFJ bars AT&T from providing electronic publishing services through its own facilities for seven years from the date of divestiture. 552 F. Supp. at 225.

[8] We have required the BOCs to provide CPE and enhanced services through structural separation requirements similar, but not identical, to those imposed upon AT&T. *BOC Separation Order*, 95 FCC 2d 1117 (1984), *reconsideration*, 49 Fed. Reg. 26056 (June 26, 1984), *aff'd sub nom.* Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir., 1984), petition for rehearing pending. The extent to which the BOCs may engage in the provision of enhanced services may be

the CPE market in competition with AT&T.

9. In addition, *Computer II* required the phased detariffing and unbundling of CPE from the offering of basic transmission services. Most of the embedded base of CPE owned by the BOCs prior to the divestiture has been transferred to ATTIS. The Commission has approved an additional capitalization of more than $6.5 billion to support ATTIS' provision of this equipment, subject to AT&T's compliance with a price predictability plan and the offering of sale or lease options to customers with embedded equipment.[9] Finally, the Commission recently authorized ATTIS to resell basic domestic services of any carrier including an affiliate, so long as such services are acquired at nondiscriminatory tariffed rates and are accounted for separately.[10]

10. Furthermore, there are strong indications that competition in the CPE market has grown significantly and will continue to grow. In the *Final Decision* in the *Second Computer Inquiry* we characterized competition in the provision of CPE as "infant yet promising."[11] It is currently estimated that there are approximately 3,000 suppliers of business CPE in the domestic market.[12] In 1983 independent manufacturers shipped more than 75% of PBXs and more than 70% of key telephone instruments.[13] The non-carrier share of installed key telephone instruments reached 19.2% in 1983 and is expected to reach almost 30% by 1988, and the non-carrier share of the market for installed PBXs reached 39% in 1983 and is projected at more than 43% by 1988.[14]

II. AT&T PETITION FOR RELIEF FROM STRUCTURAL SEPARATION REQUIREMENTS AND RESPONSES

11. On April 30, 1984, AT&T filed a petition requesting relief

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limited by the MFJ's restriction on their provision of "information service," which may encompass part or all of the enhanced services defined by the Commission. See *BOC Separation Order*, 95 FCC 2d at 1122, n.10. In addition, unlike AT&T, the Commission has permitted BOC regulated operations to provide billing for their subsidiaries, install and maintain residential and single-line telephones, and engage in dial-tone referral of prospective CPE customers. The BOC's subsidiaries have been permitted to file plans to act as agents for the sale of affiliates' regulated services. *BOC Sales Agency Order*, FCC 84-290 (released July 11, 1984), *recon. pending.*

[9] *Embedded CPE Detariffing Order*, 95 FCC 2d 1276 (1983), *recon. pending.*

[10] *ATTIS Resale Decision*, CC Docket 83-1375, 49 Fed. Reg. 28,835 (July 17, 1984), *recon. pending*, petition for stay denied, FCC 84-142 (released September 24, 1984).

[11] 77 FCC 2d at 467.

[12] NATA 1985 Telecommunications Source Book at 86.

[13] *Id.* at 70, 77.

[14] *Id.* at 65.

from the Computer II structural separation requirements. On June 4, 1984, the Commission issued a public notice requesting further information from AT&T on which to evaluate AT&T's petition, and setting a schedule for AT&T's response and pleadings by interested parties. An appendix to this Notice lists the more than 30 parties which filed comments and the more than 25 which responded to AT&T's supplemental information and filed reply comments.[15] Such parties include common carriers, providers of CPE and enhanced services, consumers of both regulated and competitive offerings, and agencies of the federal government. In addition, the Commission has received numerous informal comments supporting AT&T's petition.

12. AT&T asserts that it no longer exhibits the four characteristics enumerated in the order on *Reconsideration* of *Computer II* which make structural separation warranted for a common carrier which engages in the provision of enhanced services and CPE.[16] AT&T argues that because of the divestiture of local exchange facilities, the growth of competition in the provision of interexchange services, the change in AT&T Technologies (the successor to Western Electric) from a supplier of equipment to captive operating companies to a competitor in actively competitive markets, and the penetration by other companies into the markets for both network equipment and CPE, it is no longer able, nor does it have the incentive, to engage in the anticompetitive activities which the *Computer II* requirements are meant to control. AT&T asserts that it cannot discriminate in the interconnection of competitor's offerings to its basic services network because the BOCs rather than AT&T devise the specifications for connecting CPE to the network and control the actual intercon-

[15] A summary of AT&T's Petition for Relief and the pleadings filed in response to the public notice are available for public inspection at the Commission's offices.

[16] These include (1) the ability to engage in anticompetitive activity through control over "bottleneck" facilities, i.e.; local exchange and toll transmission facilities, on a broad national geographic basis; (2) the ability to engage in cross-subsidization to the detriment of the communications ratepayer; (3) vertical integration of the carrier and affiliated entities, with special emphasis upon research and development and manufacturing capabilities that are supported by communications derived revenues; and (4) the possession of sufficient resources to engage in competitive ventures through a separate subsidiary. *Reconsideration*, 84 FCC 2d at 72. The Commission has indicated that these characteristics are only guidelines in an overall analysis of the costs and benefits of requiring structural separation for any particular carrier, and that a carrier may be subject to structural separation even if it does not exhibit these characteristics to the same degree as did pre-divestiture AT&T. For example, in the *BOC Separation Order*, the BOCs were held to be subject to structural separation even though they exhibit control over bottleneck facilities on a regional rather than national basis. 95 FCC 2d at 1137.

nection in most cases. Moreover, asserts AT&T, to discriminate would drive potential customers to the growing number of competing providers of basic services. AT&T represents that the decline in its share of the interexchange market and failure to meet its allowable rate of return compel it to avoid loading costs of competitive ventures into revenue requirements. It further represents that it has lost a significant pool of captive revenues which might have been usable to cross-subsidize competitive ventures because Technologies estimates that only 13% of its sales are to AT&T Communications (ATTCOM), its common carrier affiliate, and that only 4% of Technologies' total sales are of products sold exclusively to ATTCOM.

13. In addition, argues AT&T, the *Computer II* structural separation requirements impose costs which far outweigh any limited benefits which they may still provide. Restrictions on the joint marketing of enhanced services, CPE and basic services assertedly prevent AT&T from providing the complete systems solutions which consumers want and need. The restrictions on providing enhanced services through network facilities stifle the development of new technologies which would improve the basic services network, contrary to the objectives of *Computer II.* Requirements that Technologies and Bell Laboratories, AT&T's manufacturing and research and development arms, deal with ATTIS on an arms length basis, purportedly lead to inefficiencies in developing and marketing competitive offerings, and require duplication of work force and expenses. In its reply comments, AT&T estimated duplicative expenses at more than $1 billion annually. Finally, AT&T argues that the inefficiencies imposed on it by *Computer II* contribute to its difficulties in responding to foreign penetration and the deficits in the balance of trade in telecommunications equipment.

III. COMMENTS

14. AT&T's position is supported fully by some end users, telecommunications unions, and by the Department of Defense. The BOCs generally agree with AT&T that structural separation is unwarranted following divestiture, but contend that they should be treated the same as AT&T, i.e., AT&T should be exempted from structural separation only if the BOCs are concurrently relieved. Most BOCs believe that if AT&T is relieved unilaterally, it will be able to dominate the CPE market, contrary to the Commission's goals of promoting competition in the

offering of CPE.[17] The National Telecommunications and Information Administration (NTIA) supported AT&T's request to be relieved of structural separation in the provision of CPE, but urged caution in removing structural safeguards for the provision of enhanced services until the Commission has determined in a separate ongoing proceeding[18] whether AT&T continues to possess market power in the provision of interexchange services which would enable it to act anticompetitively in the provision of enhanced services. In addition, NTIA cautioned that the Commission should be careful to ensure that relieving AT&T of structural separation for some or all offerings not impede the flow of network information to providers of competitive products and services. Other parties, while generally urging that the Commission retain structural separation requirements, suggested that the Commission might relieve AT&T of individual conditions that may be outmoded and impose undue inefficiency, for example the rule prohibiting AT&T from marketing software-based products exclusively through its subsidiary.[19]

15. Parties opposing relief argue first that the relief requested by AT&T is premature.[20] These parties note that only recently did AT&T divest the BOCs, receive the embedded base from the BOCs, and obtain authorization for ATTIS to resell basic services. In addition, the effects of the MFJ's requirement that all interexchange carriers receive equal access to local exchange facilities, and of the Commission's subscriber line charges, have not reached a measurable stage. Even if AT&T's market share and putative market power in the interexchange market have declined to the levels alleged by AT&T, which is disputed, these parties assert that such reductions may be attributable to

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[17] This notice does not deal with the issue of whether structural separation requirements remain warranted for the BOCs. Different issues are implicated concerning the BOCs. We remain committed to consider structural separation of BOC competitive offerings after two years have elapsed from the date the BOCs were required to fully implement separate structure. *BOC Separation Order*, 95 FCC 2d at 1140.

[18] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, Notice of Inquiry, CC Docket No. 83-1147 (released October 27, 1983) (*Long-Run Regulation*).

[19] IBM, Comments at 11-12; US West BOCs, Comments at 10-12; Telecommunications International Union, Reply Comments at 5; Digital Equipment Corp., Reply Comments at 6-7.

[20] On January 18, 1985, ADAPSO filed a motion to accept supplemental comments on AT&T's Petition. AT&T opposed the motion. In light of our decision herein, *see* paragraph 30(3), *infra*, we see no need to accept ADAPSO's pleading and therefore deny its motion. ADAPSO is free to file its comments in response to this Notice.

temporary dislocations caused by the above events. In any event, several opponents assert that the Commission should not act upon AT&T's petition in this proceeding until it has determined in the *Long-Run Regulation* proceeding whether AT&T still possesses market power in interexchange services that would enable it to act anticompetitively in other lines of business.

16. In addition, opponents contend that AT&T still possesses not only market power but also the functional, if not literal, equivalent of bottleneck facilities which would enable it to act anticompetitively. These parties contend that AT&T dominates the provision of private line, WATS and 800 services in high-volume intercity markets, which are the key types of services to which CPE and enhanced services must be interconnected in order to compete effectively. Furthermore, AT&T purportedly can dictate the standards for products and services which must interoperate if not directly interconnect with its facilities. With regard to the provision of CPE, it is alleged that AT&T's ownership of the installed base provides it with undue leverage in promoting its own new CPE. It is also argued that despite its divestiture of the BOCs' bottleneck facilities and loss of a captive purchaser for its products, AT&T possesses ample revenues from regulated offerings with which to cross-subsidize unregulated offerings, and that unseparated provision of regulated and unregulated offerings would produce large scale common costs which could be shifted to the regulated side. With regard to the putative costs engendered because of structural separation, opponents contend that AT&T could even within the constraints imposed by *Computer II* reorganize its own operations to more effectively coordinate product and service development and marketing. They also contend that the *ATTIS Resale Decision* gave AT&T ample ability to provide its customers with systems solutions, a contention which AT&T disputes. Finally, opponents disagree with AT&T's contention that any possible cross-subsidization would be adequately detected by monitoring the accounting separation of regulated and unregulated operations.

IV. DISCUSSION

A. Costs and Benefits of Continued Structural Separation of AT&T's Provision of CPE

17. The structural separation conditions we have imposed on AT&T and other carriers engaging in the provision of competitive

offerings were never intended to be static or permanent. A fundamental precept beginning with the *Final Decision* in the *Second Computer Inquiry* has been that the need for structural separation for any particular carrier would depend on the circumstances peculiar to that carrier, and that the balance of costs and benefits of structural separation for a carrier will necessarily change with changes in that carrier's circumstances and in industry circumstances.[21] Relief from structural separation may be warranted for a particular carrier even though the benefits of structural separation have not dissipated totally. Thus, relief may be warranted if the benefits have so diminished that the costs of separation are more onerous than the benefits to ratepayers and competition which might ensue from maintaining structural safeguards. As discussed in the following paragraphs, we tentatively conclude that the costs of continuing to require structural separation for AT&T's provision of CPE outweighs the benefits.

18. It is indisputable that there have been fundamental changes in the circumstances of both AT&T and the telecommunications industry since we imposed structural separation on AT&T. AT&T is no longer the dominant provider of local exchange telephone service. Its assets and revenues, while still large, are substantially less than the total enjoyed by the predivestiture Bell System at the time the Commission required AT&T to provide enhanced services and CPE through structural separation. AT&T's share of new CPE installations has markedly declined due to intense competition in the CPE marketplace despite its continued possession of much of the installed base of CPE. For example, estimates by AT&T and by NATA indicate that AT&T's share of sales of new PBX's for 1982 and 1983 declined to the range of 23-32%.[22] The BOCs, having reentered the market for CPE, are a potentially potent source of competition. In addition, the BOCs are actively purchasing both network and terminal equipment from sources other than their former manufacturing affiliate, AT&T Technologies (formerly named Western Electric). AT&T Technologies, as noted above, as a consequence of divestiture, has been required to seek new customers in addition to affiliated companies and thus may be subject to marketplace checks on its pricing. On the other

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[21] *BOC Reconsideration Order*, 49 Fed. Reg. at 26058, citing *Final Decision*, 77 FCC 2d at 389, 463.

[22] AT&T Petition at 62; North American Telecommunications Association 1985 Telecommunications Source Book, Statistical Review at 77; *See* ATTIS Resale Decision at n.27 (AT&T's share of CPE market is decreasing; ATTIS is expected to lack market power in CPE provision when the price predictability program for installed base terminates).

hand, we agree with the contentions of some commenters that AT&T's control of the installed base of CPE which the BOCs transferred to ATTIS at divestiture may give AT&T leverage in promoting its new CPE to installed base customers. We doubt, however, that the presence or absence of structural separation will affect the degree of any such leverage. In addition, we have the authority to enforce the Clayton Act should AT&T or other carriers engaged in arrangements which contravene the antitrust laws.[23]

19. In light of these significant changes, we doubt contentions proffered by some parties that the balance of costs and benefits of structural separation for AT&T remains the same as when structural separation was first imposed. The first important benefit to consider is the role of structural separation in deterring anticompetitive practices such as discriminatory interconnection of CPE. AT&T, lacking local exchange bottleneck facilities, has far less ability to discriminate against competitors' CPE offerings through the installation and maintenance process. Moreover, while AT&T continues to play an important role in determining the characteristics of products that will interoperate with its network, AT&T is only one of a mutiplicity of suppliers of such products which would be placed on the end of a transmission line. The participation of the BOCs in the provision of CPE places a check on the likelihood that AT&T could design a transmission system to preclude use of all but its own products and services without detection or marketplace retribution. This could prove to be superior to any competitive check which existed when the *Computer II* rules were adopted. Nor is it likely that AT&T can anticompetitively leverage consumers to unquestioningly accept its products as an adjunct to its services when it does not control the local loop and consumers have access to a multiplicity of alternative product and service combinations.

20. Some parties argue that AT&T already possesses all the flexibility it needs because ATTIS can resell basic services and can act as an ordering agent for its customers to obtain ATTCOM tariffed communications services. AT&T denies that resale or the ability to act as an ordering agent solves all its problems. Furthermore, some parties argue that the *Computer II* rules provide AT&T with sufficient flexibility to reorganize its manufacturing, development and marketing operations to solve its

[23] 15 U.S.C. § 21. We do not now have to decide whether AT&T has market power in interexchange services in order to conclude that the costs of structural separation for AT&T's provision of CPE now outweigh the benefits.

problems, for example, by transferring development personnel to ATTIS. AT&T denies that it could solve all of its *Computer II*-related problems through reorganization. For instance, ATTCOM would still be unable to provide incidental CPE even after a reorganization within the Technologies Sector. Parties should address what impact resale and ordering agency or AT&T's ability to reorganize consistent with the *Computer II* rules have on our tentative conclusion reached here to relieve AT&T from structural separation for its provision of CPE.

21. It is also likely that AT&T's ability and incentive to manipulate costs to maximize its profits in competitive ventures to the detriment of regulated services or to price predatorily in competitive ventures has declined significantly. The predivestiture AT&T had a significant pool of funds derived from monopoly ratepayers with which to attempt such activities. In addition to possessing revenues derived from monopoly exchange services, AT&T sold most of its products to captive affiliates, without the usual market checks on its prices. This gave AT&T substantial opportunity to shift costs to the ratepayer and recover them in rate proceedings while enabling AT&T to lower its CPE prices below cost-justified levels. In addition, unregulated affiliates such as Bell Laboratories and Western Electric could shift some of the costs of research, development, installation and maintenance and other activities benefitting competitive ventures as to its products sold to regulated companies without effective marketplace scrutiny.

22. Structural separation, while not a foolproof deterrent to such activity, increases the detectability of such practices. There are substantial doubts whether such a remedy, however, is necessary at this juncture. AT&T is faced with growing competition in its regulated and unregulated ventures. Moreover, as noted, AT&T represents that most of its equipment sales are now to third parties, and therefore most of its sales of these products appear to be subject to marketplace checks. In light of these changes, AT&T's ability to engage in cost-shifting or predatory pricing should logically have diminished substantially, and its ability to succeed in such practices without marketplace retribution is questionable.

23. On the other hand, the costs of maintaining structural separation for AT&T outweigh the limited benefits that remain since the risks structural separation was designed to control appear to have diminished. Structural separation imposes several costs on the public. It requires AT&T to maintain duplicative

work forces and facilities, the cost of which AT&T has estimated as more than $1 billion annually.[24] It prevents the public from dealing with a single vendor for both network service and CPE needs, as numerous informal commenters have noted. Finally, it may make AT&T a less effective competitor in the CPE market, to the detriment of competition and the public interest. We are taking two steps to relieve possibly onerous costs short of immediately removing structural separation. We herein waive the prohibition against AT&T developing software-based products exclusively for marketing through ATTIS,[25] and grant AT&T's request for increased sharing of administrative services between AT&T Technologies and ATTIS. These actions, however, will not by themselves alleviate all of the problems of which AT&T complains.

24. We agree with opponents of AT&T's Petition for Relief that the *Computer II* rules do not preclude AT&T from reorganizing in a manner that will reduce some of these inefficiencies, as demonstrated by AT&T's reorganization in early 1984 along lines-of-business under the regulated Communications sector and the unregulated Technologies sector, and by its recently announced plans to shift certain lines of business, including manufacturing facilities and other resources, into ATTIS.[26] However, there appear to remain significant costs of duplication and barriers to efficient development even after these modifications. Moreover, these actions illustrate some of the burdens which structural separation imposes on the Commission as well as AT&T, *i.e.*, due to the *Computer II* rules, AT&T must keep the Commission informed of internal restructuring which is essentially a matter of corporate judgment. This process can prove costly and disruptive to AT&T and requires the expenditure of limited Commission resources.

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[24] It should be noted that AT&T enumerated the costs of duplication it asserts are caused by Computer II for the first time in its reply comments. Parties have not had the opportunity to comment on that information. Parties are requested to comment on this subject as well as on the effect of AT&T's announcement, made after the close of the pleading cycle in ENF 84-17, that it intends to move certain factories and lines-of-business from AT&T Technologies to ATTIS. In its comments, AT&T should described this reorganization and identify what part of the $1 billion savings would be achieved through the reorganization. In addition, AT&T should quantify in its proposal savings achievable by our decision herein to waive restrictions on software development and to permit sharing of personnel services by Technologies and ATTIS.

[25] 47 C.F.R. § 64.702(c)(4).

[26] AT&T Press Release dated September 27, 1984.

B. Proposed Relief and Questions Raised by Proposal

25. For the reasons stated above, we propose to remove some of the structural separation requirements which we have imposed on AT&T. We propose to permit AT&T to provide CPE on an untariffed basis without the need for structural separation from basic services. We would amend the *Computer II* rules to provide a blanket exemption for AT&T's participation in the provision of CPE. Under this proposal ATTCOM, AT&T Technologies, or other unseparated entities would be permitted to provide CPE to end users, market CPE jointly with basic services, and otherwise organize their offerings of CPE without regard to the *Computer II* structural separation requirements. Those requirements would remain in force, however, for the provision of enhanced services. ATTIS, as AT&T's enhanced service provider, would be the only entity within AT&T that would be permitted to provide enhanced services or to resell basic services on a nondominant basis. If ATTIS chose to continue to provide CPE, separately or in conjunction with enhanced services, it would be required to do so under the existing structural rules, either manufacturing the equipment itself or acquiring it on an arms' length basis from AT&T Technologies or other suppliers. Parties of course retain the opportunity to demonstrate that no relief is necessary, and are free to suggest lesser degrees of relief, for example, authorizing only a limited degree of joint marketing between AT&T's unregulated and regulated ventures. AT&T is hereby directed to describe the impact the relief we are proposing herein would have on its provision of CPE and other competitive offerings. AT&T should indicate whether, it would continue to provide competitive offerings both through ATTCOM and through an integrated Technologies sector. Parties are requested to comment on the desirability of such an approach and its consistency with remaining structural separation requirements if we remove structural separation requirements for CPE but not enhanced services. We intend to take action consistent with our proposal or any other actions which may prove warranted.

26. We request comment on this proposal from interested parties. We also request comment on alternatives that commenters believe would provide similar protection for ratepayers and CPE purchasers but might prove more efficient or more desirable

in some other respect. We welcome alternative proposals.

27. The BOCs are required to utilize Centralized Operations Groups (COGs) to ensure that all orders and installations of basic services to be connected to competing CPE vendors' products are handled in a non-discriminatory sequence.[27] Comment is solicited concerning whether AT&T should be required to establish and report to the Commission concerning similar procedures to ensure that enabling it to provide CPE and basic services on an unseparated basis does not unfairly prejudice competitors. Furthermore, parties should address the means by which the Commission could enforce this mechanism absent structural separation of AT&T's CPE operations.

28. As we stated previously, we are deferring until a later proceeding the issue of whether AT&T's provision of enhanced services should continue to be subject to structural separation. Under the current proposal, ATTIS is the only entity within AT&T which is permitted to provide enhanced services and resell basic services as a nondominant carrier. It can purchase CPE for retail sale from any vendor including Technologies. ATTIS would still be required, however, to comply with all structural separation conditions even if it does provide CPE in conjunction with enhanced or resold, basic services. ATTCOM, AT&T Technologies or other unseparated entities, would be permitted to provide CPE but the instant proposal would not extend to unseparated entities the authority to resell basic services on a nondominant basis or provide enhanced services.

29. As clarified in the *Disclosure Order*,[28] Section 64.702(d)(2) of our rules requires that when a carrier subject to structural separation communicates to its subsidiary, or to its research and development or manufacturing affiliates concerning a matter for the benefit of the subsidiary, network design or technical specifications, or information concerning changes to the network which could affect the interconnection or interoperation of competitive offerings with the network, that information must be publicly released concurrently with the intracorporate disclosure.[29] Pursuant to the *Reconsideration* of *Computer II*, and Part 68 of our Rules, all carriers must disclose such information within a reasonable time. However, the disclosure rules may be more

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[27] *NATA Petition for Emergency Relief*, FCC 84-132 (released April 11, 1984). Although the installation of AT&T services may actually be provided by the BOCs, AT&T would still process orders for those services.

[28] Computer and Business Equipment Manufacturers Association, 93 FCC 2d 1226 (1983).

[29] *Id.* at 1248.

restrictive to carriers subject to structural separation because we have required them to disclose information when it moves within the corporation, which may occur well before changes are actually made. Thus, as AT&T argues, its internal development of products may be hampered because it must disclose information at a far earlier stage in the development process than competitors. We seek comment on means by which we can preserve the fair disclosure of network-related information by AT&T without unduly hampering its development of CPE. Commenters should also address whether it is feasible to apply different rules for the disclosure of information to enahanced services operations than to CPE operations if one remains structurally separated and the other is not. The same concerns also apply to our rule requiring that the carrier not provide customer proprietary information to its subsidiary unless such information is available to other members of the public on equal terms and conditions.[30]

30. In addition to other issues raised by this Notice, AT&T should respond to the following questions. We expect AT&T to provide information sufficient to permit parties to give complete responses.

(1) Should AT&T be required to implement COG-like procedures to ensure that customers of competing providers of CPE do not receive unfair treatment in the interconnection of their CPE to the network?

(2) By what means short of structural separation can the Commission prevent AT&T's unseparated provision of CPE and basic services from leading to abuse of the intracorporate exchange of information concerning interoperability of competitive offerings with the network?

(3) AT&T should separately identify the costs it expects to save because of its planned reorganization to move certain lines of business from AT&T Technologies to ATTIS.

(4) Even if AT&T did have control over bottleneck facilities, such as interLATA toll facilities, would the existence of such control alter our tentative conclusion to relieve AT&T of structural separation for CPE?

(5) Describe the accounting systems and techniques AT&T would use to identify and allocate costs between regulated and unregulated businesses if structural separation requirements were eliminated.

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[30] 47 C.F.R. § 64.702(d)(3).

(6) How should the ability of ATTIS to provide resold, basic services or to act as an ordering agent to obtain ATTCOM tariffed communications for its customers or AT&T's ability to reorganize itself consistent with the *Computer II* rules affect our tentative conclusion to relieve AT&T of structural separation for CPE?

(7) What impact, if any, will our tentative decision to relieve AT&T from structural separation for CPE have on AT&T compliance with our network information disclosure rule?

(8) To what extent is AT&T able to continue to set *de facto* interconnection standards for some CPE despite the fact that a local exchange carrier's facilities stand in between the customer and AT&T? *See* IDCMA Comments at 19-20 (July 19, 1984).

C. Actions Regarding Specific Computer II Restrictions

1. Waiver to Permit AT&T Technologies to Develop Proprietary Software for ATTIS

31. Among the specific burdens which AT&T asserts that *Computer II* places upon it is the inability to market products containing software exclusively developed for customers of AT&T through an exclusive marketing arm.[31] As AT&T notes, AT&T-Technologies is permitted to sell CPE directly only to a limited range of end users. The "software rule" requires ATTIS to develop its own software or contract with non-affiliated vendors for the development of software other than that sold "off the shelf" to all interested purchasers on the same terms and conditions. Technologies and ATTIS must deal with each other at arms' length, i.e., software based products developed by Technologies for sale to end users must be available for resale by any CPE vendor. ATTIS must pay fully compensatory prices for research and development efforts performed on its behalf by affiliated entities.[32] AT&T contends that, taken together, these requirements impair its ability to compete for several reasons. First, AT&T cannot use ATTIS as an exclusive channel for software-based products. Second, AT&T must prematurely decide whether a software-based product must be developed within Technologies or within ATTIS, leading to possible inefficiencies or duplication

[31] AT&T Petition at 34-42.
[32] 47 C.F.R. § 64.702(c)(4).

of effort if the decision proves wrong. Third, Technologies is denied the benefits of innovation and cost savings which could occur if it could jointly develop software for its own and ATTIS' offerings. Despite our finding in the *Second Computer Inquiry* that there are diseconomies of scale in software development and applications,[33] AT&T contends that, since the software rule was adopted, great changes have occurred in the field, including the large scale reuse of software modules in both network equipment and CPE. AT&T asserts that the software rule largely negates its ability to utilize the economies produced by such reuse. AT&T also contends that one of the bases for the software rule, the risk that AT&T could misallocate the costs of developing software incurred between regulated and unregulated affiliates, has greatly decreased with divestiture.

32. Commenters were divided on the question of the continued justification for the software rule. Certain commenters believe that the rule is unjustified and that permitting joint development and marketing of software-based products within the Technologies sector would allow AT&T to efficiently utilize its resources and benefit consumers,[34] that the Commission can achieve its essential goal of avoiding shifting costs of software development to ATTCOM's revenue requirements as long as the network information disclosure rule is enforced,[35] and that continued application of the software rule retards network development.[36] Other parties support retention of the software rule as a safeguard against the possibility of cross-subsidization and improper disclosure of network design specifications to ATTIS.[37] ADAPSO contends that if joint development of software does indeed produce economies, ATTIS, with a capitalization of more than $10 billion, is of sufficient size to derive such economies through the independent development of software for CPE.[38]

33. We have determined that the costs of retaining the software rule outweigh the benefits of retention, which could be achieved through less onerous means. The inability to reuse software and to market exclusive products through ATTIS requires duplication and hampers AT&T's ability to design

[33] *Final Decision*, 77 FCC 2d at 479.

[34] API Central Committee, Comments at 7-8; Digital Equipment, Comments at 6-7; Telecommunications International Union at 5.

[35] IBM, Comments at 10-12.

[36] US West BOCs, Comments at 10-12.

[37] GTE, Comments at 18-22; ICA, Comments at 20-21; IDCMA, Comments at 38-40; NATA, Comments at 19-25; USTEL, Reply Comments at 5-6.

[38] ADAPSO, Reply Comments at 44-48; NATA, Reply Comments at 5-6.

competitive CPE, in which its sales have already noticeably declined. On the other hand, we have already discussed in this Notice our tentative belief that the threat of cross-subsidization by AT&T has diminished. The rules against unfair disclosure of network-related information to ATTIS are applicable to situations in which software development is undertaken on behalf of ATTIS by affiliates. For these reasons, we conditionally grant a waiver of section 64.702(c)(4) of the rules to permit AT&T Technologies to contract with ATTIS for the development and sale of exclusively developed software and products containing such software. This waiver is conditioned on AT&T's filing, within thirty days from the release of this Notice, a plan describing steps it will take to ensure that it complies with the network information disclosure rule as defined in the *Disclosure Order*, 93 FCC 2d 1226 (1983), and describing the accounting mechanisms AT&T will employ to ensure that all direct and indirect costs involved in software development are not attributed to ratepayers and that ATTIS fully compensates affiliates for such costs. We hereby delegate to the Chief, Common Carrier Bureau, authority to approve or modify this plan. This waiver does not take effect until approval is granted.

2. AT&T's Request for Temporary Waiver to Facilitate a Single Point of Contract with all Departments of the Federal Government

34. On July 17, 1984, AT&T filed a petition for waiver of the *Computer II* structural separation requirements to permit AT&T Technologies to sell CPE to all entities within the federal government on the account of ATTIS until computer records regarding CPE formerly owned by the BOCs can be incorporated into Technologies' billing system.[39] The Department of Defense filed comments supporting AT&T's request and numerous agencies of the federal government have filed informal comments in support of AT&T. Several parties oppose the relief sought by AT&T.[40] AT&T proposes to consolidate its dealings with all

[39] File No. 84-43. The requested wavier would extend to a broader range of governmental communications systems than the waiver we recently granted to meet the National Security and Emergency Preparedness communications needs of certain emergency and defense-related agencies. *Procedure for Implementing the Detariffing of CPE and Enhanced Services*, FCC 84-652 (released January 4, 1985).

[40] Parties filing pleadings opposing AT&T's petition included American Satellite Co., Association of Long Distance Telephone Companies, the Bell Atlantic Companies, the BellSouth Companies, GTE Service Corp., MCI, the US West Companies, NYNEX Service Corp., Pacific Telesis, Rolm Corp., Southwestern

federal government agencies and departments into a Federal Systems Organization within Technologies and therefore requests only a limited waiver through the end of 1985 to allow ATTIS to provide computer support to Technologies. AT&T asserts that paragraph 92 of the *Further Reconsideration* of *Computer II*[41] made clear that Technologies can sell CPE to the government as an end user. Various commenters oppose the request, disputing that *Computer II* unequivocally recognized Technologies' right to sell CPE to the federal government directly.[42] Therefore, opponents argue, AT&T should be made to request a broader waiver. Opponents also assert that permitting AT&T to establish the Federal Systems Organization in the manner described would be more costly than beneficial because reintegrating regulated and competitive offerings for such a large customer poses risks of substantial cross-subsidization and anticompetitive effects. Moreover, it is argued that the authorization of ATTIS to provide resold, basic services in conjunction with CPE and enhanced services should allow ATTIS to be the single point of contact to meet the government's needs. AT&T argues that the question of its ability to resell basic services to the government through ATTIS is a substitute for the waiver it seeks is irrelevant.

35. We are not convinced that it is necessary at this time to grant a waiver to AT&T regarding its provision of CPE to the federal government. We have recently granted AT&T a waiver to provide CPE on an unseparated basis for 21 national security and emergency preparedness systems.[43] AT&T needs no further wavier to utilize ATTIS's billing system for the 21 national security and emergency preparedness systems. We see no reason to readdress that decision by expanding its provisions on a government-wide basis before finally resolving the issues raised in this Notice. In any event if we grant the relief we are considering herein to remove structural separation for AT&T's provision of

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Bell Telephone Co., and United Telecommunications, Inc.

[41] 88 FCC 2d at 544-45.

[42] We agree with the opponents that AT&T's interpretation of paragraph 92 of the Further Reconsideration is overly broad. Paragraph 92 only permitted Technologies (then Western Electric) to engage in its "traditional manner of conducting business." Further Reconsideration, 88 FCC 2d at 544. At that time Western Electric marketed CPE directly only to the Department of Defense and only in minor instances to other agencies. The BOCs provided CPE to the vast majority of federal agencies just like any other large customer. Therefore, AT&T's argument about the meaning of paragraph 92 is rejected.

[43] *Procedures for Implementing the Detariffing of CPE and Enhanced Services*, FCC 84-652 (released January 4, 1985).

CPE, AT&T's petition will be moot.

3. AT&T's Request to Permit AT&T Technologies to Provide Administrative Services to ATTIS

36. By letter dated August 28, 1984, to the Chief of the Common Carrier Bureau, AT&T requests permission for AT&T Technologies, Inc., to provide ATTIS six administrative services which have not previously been authorized by the Commission. These are (1) administering Equal Employment Opportunity (EEO) and Affirmative Action policies and practices, and handling EEO charges and investigations; (2) administering programs to identify high potential management employees; (3) administering management job evaluation and salary classification practices, and providing suggested salaries for newly hired employees; (4) administering a benefits and relocation plan; (5) administering a data base covering personnel matters, benefits and payroll information; and (6) recruiting, interviewing, and referring to ATTIS candidates for management and non-management positions. Both ADAPSO and IDCMA filed comments opposing this request. AT&T has responded to those comments.

37. In our *General Departments Order*,[44] we approved AT&T's plan for the General Departments to provide various categories of services to the separate subsidiary, including personnel recruitment and management services. We denied, however, permission for other affiliates to provide such services absent a showing that a compelling need outweighed the potential increase in cross-subsidy between regulated and unregulated operations, the entanglement between affiliates which could undermine the efficacy of structural separation in the minds of employees, and the increased monitoring complexity exemplified by the 24 or more additional accounting sytems which the Commission would be required to review. Subsequent to divestiture, AT&T has replaced the General Departments with a smaller corporate headquarters organization and has established within AT&T Technologies a consolidated personnel and labor relations organization replacing the personnel organizations within each company now in the Technologies sector. This arrangement was described in a report on post-divestiture sharing of administrative services submitted by AT&T on March 16, 1984. The range of administrative services provided to ATTIS as described in this report is subject to continuing

[44] 90 FCC 2d 184 (1982).

review by the staff.

38. AT&T asserts in its request that the proposed sharing would reduce costs of providing personnel services and lead to efficiencies within its organization without passing on costs to ratepayers. AT&T represents that the sharing would permit the elimination of at least 155 positions, saving an estimated $8 million annually. It would permit Technologies to promote uniform personnel practices, promoting employee career development, and facilitating accurate matching of employees with career paths. AT&T asserts that this sharing would be wholly internal to its Technologies sector, and that there is no danger of confusing employees concerning *Computer II* requirements or of passing on costs to ratepayers. In addition, AT&T contends that even if this request is granted, the Commission's burden of monitoring accounting for shared services is smaller than prior to divestiture because it will not have to scrutinize 22 BOC systems for accounting for this sharing.

39. ADAPSO and IDCMA oppose the requested sharing on several grounds. First, they contend that it would weaken structural safeguards by blurring lines between companies. ADAPSO focuses on joint visits to college campuses on behalf of ATTIS and other Technologies companies, which it contends will inspire new recruits to believe that Technologies and ATTIS are one company. IDCMA contends that ATTIS' independence would be weakened should Technologies personnel evaluate and recommend candidates for employment by ATTIS. Both commenters also contend that the requested sharing would intermingle ATTIS and Technologies employees, leading to increases in prohibited information flows and cross-subsidization between regulated and unregulated sectors accomplished through Technologies' dealings with Communications. Both commenters further contend that the proposal would needlessly increase the complexity of the Commission's monitoring efforts by extending them into new activities, with IDCMA noting that the divestiture of the BOCs was already taken into account in our denial of reconsideration of the *Shared Services Order*.[45] Finally, ADAPSO contends that since AT&T could consolidate ATTIS and Technologies consistent with the *Computer II* rules, the asserted inefficiencies are caused by AT&T's own organizational choices rather than the *Computer II*

[45] *Shared Services Order*, 92 FCC 2d 676 (1982), *recon.*, FCC 83-355 at paras. 22-23 (released July 29, 1983).

rules and therefore the requested relief is unjustified.

40. AT&T responds that concerns about weakening *Computer II* safeguards are unjustified and that granting its request would not materially increase the Commission's monitoring burden. It contends that Technologies will merely advise ATTIS, leaving ATTIS responsibility for hiring, firing, supervising and evaluating candidates and employees based upon standards developed by a centralized organization. Moreover, asserts AT&T, existing procedures and disciplinary actions are available to curtail illicit information flows within the corporation. Finally, granting the proposal would add little detail to the monthly reports concerning the costs of shared services which the Commission already receives, and AT&T would account for the increased shared services consistently with the accounting systems which the Commission has already approved as properly allocating costs to ATTIS.

41. We have decided to grant AT&T's request pending our review of the total range of shared administrative services listed in its March 1984 report. Our approval is based upon AT&T's representations of cost savings and efficiencies which appear to outweigh any alleged damage to our structural separation requirements or the risk of impermissible cost-shifting or impermissible information flow between regulated operations and ATTIS. The services to be performed are not operational in nature and therefore the likelihood that approval will permit ATTIS to somehow obtain network related information or shift costs to regulated operations is limited. Moreover, as described earlier in this Notice, our concerns about AT&T engaging in significant cross-subsidization of unregulated activities have diminished, and as AT&T asserts, its proposal appears only to add incrementally to our review of its accounting system which we generally approved in our January 16, 1984 order.[46] Finally, AT&T has existing mechanisms to deal with information flow between regulated and unregulated operations which are subject to Commission monitoring. Nevertheless, we are still concerned with monitoring any situation which has the potential to promote prohibited information flow. We expect AT&T to ensure that new employees are made aware of the structural separation conditions and that any final decision regarding hiring, firing and evaluation of employees will continue to rest with ATTIS and not with

[46] *AT&T Report on Services to be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology*, FCC 83-601 (released January 16, 1984).

Technologies. We need not address what the interviewers tell job applicants.

V. Regulatory Flexibility Act Certification

42. Pursuant to Section 605(b) of the Regulatory Flexibility Act, we hereby certify that this proceeding does not address a "proposed or final rule" that will "have a significant economic impact on a substantial number of small entities." The pertinent definition of "small entity" is "small business" which has the same meaning as "small business concern" under Section 3 of the Small Business Act. That section defines a small business concern as "one which is independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632. AT&T by its own estimates serves the majority of users of interexchange telecommunications services and the rules which the Commission is addressing herein were established for the very reason that AT&T has been the dominant entity in its field of operation. Therefore, AT&T cannot be considered a "small entity" within the meaning of Section 605(b) of the Regulatory Flexibility Act.

43. In addition, no rules that may arise out of this proceeding will impose any regulatory requirements on, require any action by, or cause any direct impact on any entity other than AT&T. Therefore, because the rules that are the concern of this proceeding are being considered only for application to a large entity, AT&T, there is no danger of violating the purpose of the Regulatory Flexibility Act of assuring that "laws and regulations designed for application to large scale entities [are not] applied uniformly to small business." 5 U.S.C. § 601. To the extent that this proceeding is designed to determine whether AT&T's operations may no longer be of a scale requiring structural separation, it is consistent with the Regulatory Flexibility Act's purpose of "fit[ting] regulatory and informal requirements to the scale of the business . . . subject to regulation." *Id.*

VI. Ex Parte Contact Requirements

44. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the time a Public Notice is issued stating a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of a matter is adopted by the Commission, whichever is

earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission staff that addresses the merits of the proceeding. Any person who submits an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of the presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, and a copy must be provided to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

45. In view of the extensive record already compiled, which is incorporated herein, pursuant to applicable procedures set forth in Section 1.415 of the Commission's rules, interested parties may file comments within 45 days after the release of this Notice. Reply comments should be filed 30 days later.[47] All relevant and timely comments and reply comments will be considered by the Commission before further action in this proceeding. The Commission may also consider any other relevant information brought to its attention.

46. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a written summary indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. In accordance with section 1.419 of the Commission's Rules, an original and 5 copies of all comments, replies, or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also desire that each Commissioner receive a personal copy of the comments may file an additional 5 copies. Members of the general public who wish to express their interest by participating informally in this proceed-

[47] We have stated our expectation that AT&T will provide information sufficient to permit informed comment on all issues in the reply comments. If AT&T's initial comments prove inadequate to permit parties to comment on its proposals, we are prepared to entertain requests for a period of 15 days in which parties may submit additional replies to AT&T's reply comments.

ing may do so by submitting one copy of their comments, without regard to form, provided that Common Carrier Docket No. is specified in the heading. Pleadings will be available for public inspection during regular business hours in the Commission's Public Reference Room, Room 239, 1919 M Street, N.W. in Washington, D.C.

VII. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 203, 204, 205, 214, 220, 221, and 404 of the Communications Act of 1934, as amended, Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and Sections 1.411 *et seq.*, there is HEREBY INSTITUTED a notice of proposed rulemaking concerning the matters described herein including those raised by the Petition for Relief from Structural Separation Requirements filed April 30, 1984, by the American Telephone and Telegraph Company. Members of the public are notified that any policies that may be established in this proceeding may be embodied in the Rules and Regulations of the Commission.

48. IT IS FURTHER ORDERED, That the request of the American Telephone and Telegraph Company, filed August 28, 1984, for AT&T Technologies, Inc., to provide personnel services to AT&T Information Systems, Inc., IS GRANTED.

49. IT IS FURTHER ORDERED, That the petition of the American Telephone and Telegraph Company, filed July 17, 1984, for a temporary waiver of Section 64.702 of the Commission's rules regarding the provision of customer premises equipment by AT&T Technologies, Inc. to the federal government, IS DENIED.

50. IT IS FURTHER ORDERED, That Section 64.702(d)(4) of the Commission's Rules IS CONDITIONALLY WAIVED as described herein, and provided American Telephone and Telegraph Company files information in conjunction with this waiver as described herein and subject to approval by the Chief, Common Carrier Bureau, pursuant to delegated authority.

51. IT IS FURTHER ORDERED, That the Secretary shall cause this Memorandum Opinion and Order and Notice of Proposed Rulemaking to be published in the Federal Register.

52. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Memorandum Opinion and Order and Notice of Proposed Rulemaking to the Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the

Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.*) (1980).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier
Customer Premises Equipment

Commission adopted Order that removes structural separation requirements for AT&T's provision of CPE, although not for AT&T's enhanced services operations. The structural separations requirements are replaced with certain nonstructural safeguards.
—*AT&T Co.*
CC Docket No. 85-26

FCC 85-509

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company	CC Docket 85-26

ORDER

Adopted: September 18, 1985; Released: September 30, 1985

BY THE COMMISSION:

I. INTRODUCTION

1. On February 22, 1985, we released a Notice of Proposed Rulemaking[1] proposing that the American Telephone and Telegraph Company ("AT&T") be permitted to provide customer premises equipment ("CPE")[2] free of the structural separation

[1] American Telephone and Telegraph Co., Petition for Relief from Structural Separation Requirements, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No. 85-26 (ENF 84-17), 50 Fed. Reg. 9060 (March 6, 1985) (hereinafter *Notice*.)

[2] For a definition of CPE, see Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, Report and Order, 95 FCC 2d 1276, para. 1 n.2 (1983) (hereinafter *CPE Detariffing Order*).

requirements established in the *Second Computer Inquiry*.[3] In this Order we adopt the relief we proposed in the *Notice*, although we take no action in this proceeding with respect to AT&T's provision of enhanced services,[4] which will continue to remain subject to the full structural separation requirements.[5]

2. In reaching the conclusion that the structural separation requirements of section 64.702 of our rules[6] should no longer apply to AT&T's provision of CPE, we acknowledge the significant changes in the telecommunications industry that have occurred in the last several years, including the divestiture of the Bell Operating Companies ("BOCs") by AT&T and the growth of competition in CPE and inter-LATA[7] toll markets. We are, however, instituting certain nonstructural safeguards for AT&T's CPE operations to limit AT&T's ability to unfairly use its regulated operations for the benefit of its unregulated CPE activities. We will require AT&T to: (i) adhere to a modified version of the existing network disclosure rules; (ii) not discriminate in favor of its CPE customers in providing services and file periodic reports to substantiate that nondiscrimination; (iii) not disclose any AT&T-Communications' ("AT&T-COM") customer's proprietary network service information to any CPE personnel if the customer so requests; and (iv) file a detailed accounting plan prior to the final implementation of relief and submit its operations under that plan to an annual independent audit. We expect that these safeguards will provide adequate protection for CPE competition and ratepayers without unduly burdening AT&T's ability to compete vigorously in both the network services and CPE markets. However, we intend to monitor both

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[3] Second Computer Inquiry, Final Decision, 77 FCC 2d 384 (hereinafter *Final Decision*), *modified on reconsideration*, 84 FCC 2d 50 (1980) (hereinafter *Reconsideration Order*), *further modified on reconsideration*, 88 FCC 2d 512 (1981) (hereinafter *Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[4] For a definition of "enhanced services" see 47 C.F.R. § 64.702 (a) (1984).

[5] On July 25, 1985, we adopted a Notice of Proposed Rulemaking proposing a comprehensive scheme for the long-term regulation of enhanced services. Third Computer Inquiry, CC Docket No. 85-229, *Notice of Proposed Rulemaking*, 50 Fed. Reg. 33581 (August 20, 1985).

[6] 47 C.F.R. § 64.702.

[7] "LATA" stands for Local Access Transport Area, a term used to describe the areas, created by the AT&T Plan of Reorganization, in which the BOCs provide services. *See* AT&T Plan of Reorganization, *United States v. AT&T* (filed December 16, 1982) and approved in *United States v. Western Electric Co.*, 569 F. Supp. 990, 993 n.9 (D.D.C.), *aff'd sub nom. California v. United States*, 104 S. Ct. 542 (1983).

AT&T's performance under these safeguards and developments in the industry. Should the requirements we establish today prove to be either insufficient to protect competition and ratepayers or overly intrusive or unnecessary, we will take whatever action is required to adjust those requirements to the existing situation.

II. BACKGROUND

A. Second Computer Inquiry and Related Decisions.

3. In the *Second Computer Inquiry*, we conducted an extensive examination into what would be the most appropriate regulatory framework for the provision of CPE and enhanced services by common carriers and others, in light of technological and competitive developments that had occurred in the industry since the *First Computer Inquiry*.[8] In the *Final Decision*, we found a competitive market for enhanced services[9] and determined that "the terminal equipment market is subject to an increasing amount of competition . . . ."[10] We further determined that consumers were deriving considerable benefits from these competitive forces, but that these benefits could be jeopardized by regulation. Accordingly, we concluded that regulation of enhanced services was unwarranted and that the existing regulation of CPE should be eliminated. We also decided, however, that the immediate deregulation of all CPE offerings would not be in the best interests of telecommunications vendors and consumers and required a bifurcated deregulatory process.[11] Offerings of new CPE were deregulated as of January 1, 1983, and embedded equipment was to be detariffed at a later date.[12]

[8] Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Tentative Decision, 28 FCC 2d 291 (1970); Final Decision and Order, 28 FCC 2d 267 (1971), *aff'd sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d. Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973). The *First Computer Inquiry* was the Commission's initial attempt to establish the most appropriate regulatory framework for the provision of CPE and enhanced services by common carriers or entities that are affiliated with common carriers.

[9] *Final Decision*, 77 FCC 2d at 433, paras. 127-28.

[10] *Id.* at 439, para. 141.

[11] *Reconsideration Order*, 84 FCC 2d at 66, para. 48-49.

[12] In the *Reconsideration Order*, we determined that new CPE was to be deregulated as of March 1, 1982; however, the date for deregulation of new CPE was subsequently extended to January 1, 1983. *See Further Reconsideration Order*, 88 FCC 2d at 536-37, para. 69. The proceedings in CC Docket No. 81-893 address the detariffing of embedded CPE. *See infra* para. 10. "Embedded" CPE is "that equipment or inventory, which is tariffed or otherwise subject to the jurisdictional separations process as of the bifurcation date"

4. In moving toward our goal of creating a competitive marketplace for the provision of CPE and enhanced services, we were concerned with the potential for anticompetitive conduct that could result from the elimination of direct price regulation. We were particularly concerned that major carriers would be able to use their market positions in basic services to discriminate against other vendors' competitive products and services. We were also concerned that these carriers could misallocate costs from unregulated to regulated activities, allowing them to impose unfair burdens on ratepayers and engage in improper cross-subsidization of their competitive offerings. Accordingly, to protect against the potential for anticompetitive conduct, we proposed requiring these major carriers to provide CPE and enhanced services only through fully separated subsidiaries.

5. In proposing these requirements, we did not expect that we would alter a carrier's underlying incentives to engage in discrimination and cross-subsidization, but rather that the framework would make such competitive abuses more difficult to accomplish and more detectable. Under structural separation, transactions within the subject corporations would have to cross specific corporate lines and would be recorded on separate books for regulated and unregulated affiliates. We decided that these requirements should be imposed only on those carriers for whom the costs that would be incurred in complying with this form of regulation would be exceeded by the benefits gained from protecting competition and ratepayers. Thus, we sought to limit these requirements to those carriers that had the greatest capability to become involved in anticompetitive activities, either by discriminating against their competitors' CPE or by impermissibly shifting costs from unregulated to regulated activities.[13] Ultimately, we held that the structural separation requirements would apply only to AT&T.[14]

[January 1, 1983]", while "new" CPE is "[a]ny other CPE which is acquired by a carrier or manufactured by an affiliated entity after [the bifurcation date]." *Further Reconsideration Order*, 88 FCC 2d at 527-28, para. 45.

[13] *Final Decision*, 77 FCC 2d at 466-47, para. 216. In the *Reconsideration Order*, we noted two additional criteria for determining whether a particular carrier should be subject to the structural separation requirements: the integrated nature of the carrier and affiliated entities, with special emphasis on research and development and manufacturing capabilities used in conjunction with, or supported by, communications-derived revenues; and the carrier's possession of sufficient resources to enter the competitive market through a separate subsidiary. *Reconsideration Order*, 84 FCC 2d at 72, para. 65.

[14] In the *Final Decision*, we imposed the structural separation requirements on both GTE and AT&T. *Final Decision*, 77 FCC 2d at 466-75, paras. 215-32. In the *Reconsideration Order*, we concluded that the costs of applying those

6. Pursuant to the separate subsidiary rules established in the *Final Decision*,[15] AT&T's separate subsidiary was subjected to strict limitations on its ability to provide certain services. The separate subsidiary was required to have separate officers; maintain separate books of account; employ separate personnel for operations, installation, and maintenance; undertake its own marketing, including all advertising; deal with any affiliated manufacturing entity only on an arms' length basis; and utilize separate computer facilities in the provision of enhanced services. In addition, the separate subsidiary could not engage in software development with, or purchase software from, its affiliates, except that it was permitted to obtain generic software embedded within equipment that was sold "off the shelf" to any interested purchaser ("Software Rule").[16] The subsidiary was also prohibited from owning any network or local distribution transmission facilities and equipment and from providing any basic services.[17] AT&T established AT&T Information Systems ("AT&T-IS") as its separate subsidiary for CPE and enhanced services.

7. AT&T's regulated basic service entities were also subject to certain limitations on their activity. While they were permitted to own basic facilities and provide basic service, they were not permitted to engage in the sale and marketing of CPE and enhanced services. AT&T's post-divestiture basic service functions

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requirements to GTE exceeded the benefits, and we limited those requirements to AT&T. *Reconsideration Order*, 84 FCC 2d at 72-73, para. 66.

[15] *See Final Decision*, 77 FCC 2d at 475-86, paras. 233-60; *Reconsideration Order*, 84 FCC 2d at 75-86, paras. 72-105; 47 C.F.R. § 64.702.

[16] 47 C.F.R. § 64.702(c)(4).

[17] The AT&T separate subsidiary was permitted to undertake some joint activities with its affiliates under the *Second Computer Inquiry* rules, including engaging in joint research and development with its affiliates, or obtaining research and development from them, on a fully compensatory basis; manufacturing CPE; obtaining support services on a compensatory basis for sophisticated equipment obtained from an affiliated manufacturer; and sharing certain administrative functions (and associated physical space) with the parent on a cost-reimbursable basis. With respect to administrative functions, the subsidiary and its affiliates were allowed to share accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services. *Reconsideration Order*, 84 FCC 2d at 84-85, para. 102. More precise descriptions of the exact services that we allowed to be shared by the AT&T separate subsidiary and its affiliates are provided in American Telephone and Telegraph Company, Report on Services to Be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology, Memorandum Opinion and Order, 90 FCC 2d 184 (1982) and American Telephone and Telegraph Company, Report on Services to Be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology, Memorandum Opinion and Order, 92 FCC 2d 676 (1982) (hereinafter *Shared Services Order*).

are performed by AT&T-COM.

8. AT&T-COM is presently subject to a requirement that it disclose network design and other information. This requirement arose out of our determination in the *Second Computer Inquiry* that all carriers have the ability to hinder competition in fields that make use of the basic network by withholding information regarding the network.[18] Consequently, all carriers were required to disclose, reasonably in advance of implementation, information regarding any new service or change in the network ("All Carrier Rule").[19] AT&T, because of its special position, was subjected to the additional requirement that it disclose to the public any network information provided to its separate subsidiary.[20] The disclosure regulations applicable to AT&T were further refined in an order dealing specifically with disclosure obligations for network services.[21] In the *Disclosure Order*, we determined that in many cases the characteristics of the intercity network would determine whether a given
enhanced service or CPE product would operate properly.[22] Therefore, under the *Disclosure Order*, AT&T is required to disclose all technical information regarding the introduction of new network services or changes in an existing network service, as well as "additional information which relates . . . to the timing of introduction, pricing, and geographic availability of new network services or capabilities . . . ,"[23] when such information is provided to the separate subsidiary or to other entities for the benefit of the separate subsidiary. AT&T is also required to disclose technical and other information in situations involving joint research and development by AT&T and its separate subsidiary at the time it reaches a "make/buy" decision *i.e.*, when AT&T decides to manufacture itself or to procure from a nonaffiliated company, any product the design of which either affects the network interface or relies on the network interface.[24]

9. In 1974 the Department of Justice (DOJ) initiated a major antitrust lawsuit against AT&T, alleging that it had monopolized, or attempted to monopolize, a number of telecommunications services and equipment markets in violation of section 2

[18] *Reconsideration Order*, 84 FCC 2d at 82, para. 95.

[19] 47 C.F.R. § 68.110(b). *See Reconsideration Decision*, 84 FCC 2d at 82-83, para. 95.

[20] 47 C.F.R. § 64.702(d)(2).

[21] Computer and Business Equipment Manufacturers Association, Report and Order, 93 FCC 2d 1226 (1983) (hereinafter *Disclosure Order*).

[22] *Id.* at 1235-36, para. 29.

[23] *Id.* at 1238, para. 37.

[24] *Id.* at 1244, para. 58.

of the Sherman Act.[25] In 1982, two years after the *Final Decision*, but before the final deregulation of CPE was implemented, the United States District Court for the District of Columbia approved, with certain modifications, a settlement agreement between AT&T and DOJ requiring AT&T to divest itself of the BOCs and certain other assets.[26] As a consequence of divestiture, AT&T no longer provides local exchange telephone service and, in some states intra-LATA toll service, although it does continue in its other major lines of business. Embedded CPE and some interexchange facilities were transferred from the former BOCs to AT&T at the time of divestiture. AT&T also retained its enhanced services business and its manufacturing, research, and inter-LATA toll facilities. In addition, AT&T was freed from the requirements of the 1956 Consent Decree,[27] including the restrictions on its engaging in unregulated businesses.[28] The BOCs, as the local exchange providers, are prohibited from offering inter-LATA services or manufacturing CPE, although they are permitted to sell CPE and all of the BOCs have chosen to do so.[29]

10. The reorganization of the Bell System pursuant to the *MFJ*, and the resultant transfer of embedded CPE from the BOCs to AT&T, required a timely resolution of the unresolved embedded CPE detariffing issues for AT&T. Accordingly, shortly before divestiture we adopted the *CPE Detariffing Order*,[30] which detariffed AT&T's embedded CPE effective the same date as divestiture. Under the *CPE Detariffing Order*, AT&T transferred the embedded CPE to its separate subsidiary, AT&T-IS. After

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[25] 15 U. S. C. § 2.

[26] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (hereinafter *U.S. v. AT&T* or Modification of Final Judgment (*MFJ*)). Pursuant to the *MFJ*, AT&T was required to file a plan of reorganization, which was also approved by the court. *See* AT&T Plan of Reorganization, *United States v. Western Electric Co.*, 569 F. Supp. 990.

[27] *United States v. Western Electric Co.*, 1956 Trade Cases, para. 71,134 (D.N.J. 1956).

[28] However, AT&T is prohibited from engaging in "electronic publishing" for a period of seven years from the date of entry of the decree. *Id.* at 225.

[29] We have required the BOCs to provide CPE and enhanced services through structural separation requirements similar, but not identical, to those imposed upon AT&T. Bell Operating Companies, Report and Order, 95 FCC 2d 1117 (1984) (hereinafter *BOC Separation Order*), *aff'd on reconsideration*, 49 Fed. Reg. 26,056 (June 26, 1984), *aff'd sub nom. Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984).

[30] 95 FCC 2d 1276 (1983), *modified in part on reconsideration*, 50 Fed. Reg. 9016 (1985), *reconsideration denied in part*, FCC 85-220 (released May 15, 1985) (hereinafter *CPE Lease Order*).

transfer AT&T-IS was subjected to a two-year price predictability period for embedded equipment and was required to offer equipment for sale to in-place customers. The price predictability period established in the *CPE Detariffing Order* will expire at the end of 1985.

11. In the aftermath of divestiture and the final detariffing of AT&T's CPE operations, AT&T filed several petitions and waiver applications requesting that we relax certain aspects of the separate subsidiary requirements established in the *Second Computer Inquiry*. In response to one such waiver request, we issued the *AT&T-IS Resale Order*,[31] which permits AT&T-IS to resell the basic domestic services of any carrier, including an affiliate, so long as all such services are acquired at nondiscriminatory, tariffed rates. In addition, in the *Notice*, we granted AT&T a waiver of the Software Rule, permitting AT&T-IS to buy customized software from its affiliates, and we permitted AT&T Technologies ("AT&T-TI") to provide AT&T-IS with certain personnel and recruiting services.[32] Finally, AT&T was granted certain waivers in connection with the reorganization of its CPE operations.[33] These latter waivers were requested by AT&T in order to permit AT&T-IS to become a fully integrated CPE supplier, conducting research and development, manufacturing, and sales and marketing for AT&T's provision of CPE. AT&T-IS has also retained its role as the entity providing research, marketing, computers, and software design for enhanced services.

B. AT&T's Petiton For Relief From Structural Separation

12. In addition to these requests for specific waivers or modifications, of the *Second Computer Inquiry* Rules, AT&T filed a petition on April 30, 1984, requesting comprehensive relief from the structural separation requirements of section 64.702 of our rules.[34] AT&T asserted that the "monumental changes in circumstances since 1980 dictate the removal of structural separation

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[31] American Telephone and Telegraph Co., Provision of Basic Services via Resale by Separate Subsidiary, Report and Order, 98 FCC 2d 478 (1984) (hereinafter *AT&T-IS Resale Order*) *petition for stay denied*, FCC 84-142 (released Sept. 24, 1984), *reconsideration denied*, FCC 85-379 (released Aug. 1, 1985).

[32] *Notice* at paras. 33, 41. The personnel and recruiting waiver modified the Commission's decision in the *Shared Services Order*. *See supra* note 17.

[33] AT&T Information Systems, Inc., Petition for Waivers in Connection With AT&T-IS' Line of Business Reorganization, Mimeo No. 3925, File No. ENF 85-13 (released April 8, 1985).

[34] Petition of American Telephone and Telegraph Company For Relief From Structural Separation Requirements, file ENF 84-17 (filed April 30, 1984) (hereinafter *AT&T Petition*).

requirements" and argued that the "MFJ eliminates the very premises for applying these requirements to AT&T."[35] AT&T contended that in the post-divestiture environment, it no longer controls bottleneck facilities, nor does it have the ability to cross-subsidize unregulated offerings from its regulated services. It further argued that, while these changes have reduced the benefits of structural separations, the costs have largely remained. Thus, it contended that the costs of the structural separation requirements now exceed their benefits, requiring the removal of such requirements.

13. On June 4, 1984, we issued a Public Notice on the *AT&T Petition* requesting further information from AT&T and providing other interested parties with the opportunity to comment. In response to the Public Notice, more than 30 parties filed comments and more than 25 filed reply comments. AT&T's position was supported fully by some end users, telecommunications unions, and by the Department of Defense (DOD). The BOCs generally argued that structural separation is unwarranted for both their operations and AT&T's and, therefore, that any relief provided AT&T should be applied to them as well. The National Telecommunications and Information Administration supported AT&T's request to be relieved from structural separation for its CPE operations, but urged caution in removing structural safeguards for the provision of enhanced services. A number of parties opposed the *AT&T Petition*, arguing that it was premature (divestiture had occurred only five months earlier) and that AT&T still possessed market power and the functional equivalent of a bottleneck in inter-LATA transmission services.

C. The Notice

14. After evaluating the *AT&T Petition*, AT&T's supplemental comments, and the comments and reply comments filed in response to the Public Notice, we issued the *Notice* proposing that AT&T be relieved of structural separation requirements for its CPE operations and establishing a pleading cycle for further comment.[36] We indicated that full structural separations would

[35] *Id.* at 5.

[36] For a list of commenting parties, *see* Appendix A. In the *Notice* at para. 49 n.47, we indicated that we were prepared to entertain requests for an additional period of 15 days in which parties might file comments on any substantial new information in AT&T's reply comments that it had excluded from its initial comments. NYNEX filed a Motion requesting such additional time at the same time it filed its reply comments, and before it had an opportunity to review

continue to apply to AT&T's provision of enhanced services until we resolve the issues raised in the rulemaking proceeding dealing specifically with enhanced services regulations.[37]

15. Underlyhing our proposal in the *Notice* was a realization that the telecommunications industry had experienced substantial change since we adopted the *Final Decision*. We were especially aware that the divestiture of the BOCs by AT&T had eliminated its control over local exchange facilities and significantly reduced its assets and revenues from those enjoyed by the predivestiture Bell System.[38] We also noted the significant decline of AT&T's market share in CPE and the fact that it was faced with growing competition in its regulated offerings of basic, inter-LATA transmission services. In light of these findings we tentatively concluded that "the costs of continuing to require structural separation for AT&T's provision of CPE outweighs the benefits."[39]

16. In the *Notice* we invited comments on this tentative conclusion, and we identified certain additional information that would be desirable before a final determination was reached on whether AT&T should be relieved of existing structural separation requirements for its provision of CPE. Consequently, we asked AT&T and others to provide information on the costs AT&T would save from the reorganization of CPE operations into AT&T-IS, on AT&T's ability to set de facto interconnection standards for CPE, and on the effect of the *AT&T-IS Resale Order*[40] on the tentative conclusions reached in the *Notice*. We also requested information and comments on possible alternative regulatory tools we could employ to alleviate any competitive problems that might remain should we decide to follow the proposal outlined in the *Notice*. In this regard we required AT&T to describe the accounting techniques it would use to identify and allocate joint and common costs between regulated and unregulated businesses, and asked for proposals on what AT&T's network disclosure obligations should be, how to deal with intracorporate exchange of information, and whether AT&T should be required to implement special procedures to ensure that customers of competing providers of CPE do not receive discrimi-

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AT&T's reply comments. We denied the motion because AT&T provided no new information in its reply comments that it had not provided in its original comments. CC Docket No. 85-26, Order, Mimeo No. 4616 (released May 17, 1985).

[37] *See supra* note 5.

[38] *Notice* at para. 7-8; *see also infra* note 52.

[39] *Notice* at para. 17.

[40] *See supra* note 31.

natory treatment in AT&T's provision of network services. In response to the *Notice*, the Commission received comments from 20 parties, reply comments from 22 parties, as well as a large number of informal comments or letters, primarily from end users.[41]

III. RELIEF FROM STRUCTURAL SEPARATION FOR AT&T'S CPE OPERATIONS

17. In resolving the issues before us in this proceeding, we must first address the basic question whether AT&T should be relieved of the structural separation requirements for its CPE operations. We conclude that the record strongly supports a finding that the inefficiences and other costs associated with those requirements substantially outweigh any possible public

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[41] Both IBM and DOJ filed comments one day late, on April 9, 1985, in each case accompanied by a Motion for Leave to File Comments Out of Time. Since neither Motion was opposed by any party, and since the reply period in this proceeding was relatively lengthy — 30 days, we do not believe that any party would be prejudiced by our granting these Motions. Therefore, we accept the late filed comments of IBM and DOJ.

On May 23, 1985, the North American Telecommunication Association (NATA) filed a Motion To Compel American Telephone and Telegraph Company to Respond To the Commission's Questions. In this Order we deny that motion. In our view the information in the record is sufficient to support the relief we are ordering in this proceeding. To the extent we find the need for additional information, we have tailored the relief to reflect that need (*e.g.*, the requirement that AT&T submit a more detailed accounting plan prior to implementing the relief provided.) On June 7, 1985, NATA filed a motion requesting that we accept a late-filed Economic Analysis. We reject that motion because NATA has made no showing that it could not have filed the analysis in the ordinary pleading cycle established in this proceeding, which closed more than four weeks earlier on May 8, 1985. The analysis does not contain new information that was unavailable at the time the pleading cycle was closed, and thus it could have been provided on time. Moreover, since the pleading cycle had been closed for more than one month, many parties were not in a position to respond to NATA's late analysis and would have been prejudiced by its inclusion in the record. In addition, allowing additional comments would have unduly extended the pleading cycle. Nevertheless, we have undertaken a review of the NATA Analysis, and it appears that most of its major premises and arguments are incorrect, not relevant to the issues raised here, or duplicative of points it has already made in its pleadings; accordingly we find that the inclusion of this Analysis in the record would not be of significant value in resolving the issues raised in this proceeding. NATA also filed a Motion for an Evidentiary Hearing and for Oral Argument, in which it argued that the Commission should conduct such hearings and argument on the issues raised in this proceeding and, in particular, on its Economic Analysis. We deny this Motion as well. Since, as indicated, we have declined to accept NATA's late-filed Economic Analysis, there is no occasion for hearings and argument on it. With respect to NATA's general request, the decision whether to conduct evidentiary

benefits, and therefore, order that those requirements be removed. In a subsequent section of this Order, we consider what nonstructural safeguards are now appropriate for AT&T's CPE offerings.

A. Comments

18. AT&T asserts that control over bottleneck facilities, and the resulting potential for discrimination against competitors' CPE, was the primary rationale underlying the Commission's decision to require AT&T to provide CPE through a structurally separated subsidiary — a rationale that it claims has been completely undermined by the divestiture of the BOCs. It argues that its inter-LATA toll facilities are not "bottlenecks" within any antitrust, regulatory, or economic definition of that term and that such facilities provide it with no opportunity to set interconnection standards for CPE or to discriminate against its CPE competitors. It contends that the BOCs, rather than AT&T, devise the specifications for connecting CPE to the network in most cases and that were it to discriminate against non-AT&T CPE, it would only drive potential customers to its network services competitors. Nor, it claims, can it cross-subsidize its unregulated CPE activities from its regulated operations. It contends that divestiture and the growth of competitive alternatives to its inter-LATA toll facilities have eliminated whatever incentives and ability it may have had in the past to misallocate costs to its regulated services and cross-subsidize its unregulated offerings with funds derived from monopoly ratepayers. In

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hearings and hold oral argument in a rulemaking such as this is entrusted to the sound discretion of the agency, unless the specific enabling statute requires such proceedings, which the Communications Act does not. *See United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973); *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 21-23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). In our view, such further proceedings as those proposed by NATA would not aid materially in supplementing the extensive record already compiled in this docket, and would only serve to delay substantially the resolution of the important issues raised herein. Finally, on July 18, 1985, NATA filed a Conditional Motion For Adherence To Normal Rulemaking Procedures, Or, In The Alternative, For Stay, requesting us to delay the effective date of this Order until 30 days after its publication in the Federal Register, or in the alternative, to stay the relief we are granting pending judicial review. In this Order we provide that relief will be effective either 30 days after the Order is published in the Federal Register or after the Common Carrier Bureau approves the accounting plan and other information we are requiring AT&T to file, whichever is later. *See infra* notes 93, 10, 107. This, relief for AT&T will be effective no sooner, and possibly later, than the time requested by NATA. Accordingly, we deny this NATA motion as moot.

addition, it notes that it no longer sells most of its network equipment to affiliates[42] rendering cost-shifting much more difficult. Finally, it notes that there is now strong, well-entrenched competition in the CPE marketplace that could not be eliminated by a policy of below-cost pricing and thus any such strategy would cause it to incur significant costs with no attendant benefits.

19. AT&T further argues that, while the divestiture has substantially reduced the benefits of the structural separation requirements, the costs of those requirements have continued. In its Petition, AT&T identified costs associated with duplicated facilities and services, which it estimated exceed one billion dollars. In its comments in response to the *Notice*, AT&T estimates some 30% of these costs may be saved by certain modifications it has made in its organization and procedures in the last year as the result of the consolidation of all CPE activities in AT&T-IS, the waiver of the Software Rule, and the personnel waiver; but it insists that substantial costs of duplication will continue to be sustained. It also identifies significant costs created by its inability to offer customers the development and engineering of integrated telecommunications packages that only a facilities-based carrier can provide. It argues that such packages cannot be effectively developed by a non-carrier with resale authority and, thus, the authority AT&T-IS now has to resell basic transmission services is not an effective response to many customer needs. Finally, it argues that the most significant costs to AT&T and the public are those of lost opportunities, forgone products and services, and impaired innovation — costs that, it argues, cannot be reduced by Commission waivers, internal AT&T reorganizations, or any other steps short of the removal of the structural separation requirements.

20. In its comments AT&T outlines an organizational plan, which it indicates it will implement in the event that relief is granted. This plan has the following elements: (1) no lines of business ("LOBs") in AT&T-IS will be merged with AT&T-COM, although AT&T-TI, AT&T-IS, and AT&T-COM will engage in coordinated or joint activities; (2) for large business customers, AT&T-COM will establish a single interface for CPE, network services, and the customers' other communications needs, with resources drawn from regulated and unregulated activities as necessary; (3) in some cases AT&T-COM will provide "incidental"

[42] *See infra note* 57.

CPE (modems, NCTE, and other data communications equipment); (4) AT&T will probably combine or coordinate certain installation and maintenance functions for network services and CPE; and (5) AT&T is considering an integrated billing and collection system for AT&T-COM and end-user LOBs in AT&T-IS.

21. AT&T also proposes not only that AT&T-IS be relieved of structural separation requirements, but that enhanced services be allowed to remain in AT&T-IS unseparated from its CPE operations. It argues that:

> [T]he LOBs, currently within AT&T-IS should be permitted to continue providing such enhanced services unseparated from these LOB's provision of CPE. Where enhanced services are involved, the AT&T-IS LOBs use their own or unaffiliated computer facilities that are not collocated with AT&T Communications equipment; and these LOBs use only transmission services obtained under tariff and already used by other customers not affiliated with AT&T. The AT&T-IS LOBs would continue to observe these conditions in providing enhanced applications on an integrated basis with CPE, pending complete relief from the structural separation rules in the enhanced services proceeding.[43]

22. AT&T's position on relief for CPE is fully supported by a number of parties, including some end users,[44] telecommunications unions, the DOD, and DOJ. DOJ is particularly strong in its expressions of support for AT&T's position, noting that the divestiture of the BOCs has significantly reduced AT&T's ability to discriminate against customers who use its competitors' CPE and to cross-subsidize its unregulated offerings. It also argues that, to the extent that competition rather than regulation constrains AT&T's rates for network services, the threat of cross subsidization is greatly reduced, if not eliminated.[45] AT&T received additional, albeit more qualified, support from several computer manufacturers. IBM and Digital do not oppose the relief suggested in the *Notice*, provided that the Commission, while removing structural requirements, retains and strengthens certain nonstructural safeguards. CB EMA supports the concept of reexamining the costs and benefits of structural separation, but suggests that the Commission should obtain more information on actual cost savings if it decides that only CPE will be subject to relief. Most of the BOCs also generally agree with AT&T that

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[43] AT&T Comments at 13 n.*.

[44] The support of end users for AT&T's position is not unanimous. The International Communications Association, a user group, opposes removing structural separation requirements for AT&T's provision of CPE.

[45] DOJ Comments at 22 n.38.

structural separation should be eliminated;[46] but, as they did in their comments in response to AT&T's original Petition, they contend that they should be granted similar relief. They are concerned that if only AT&T is provided with relief, it will be able to reestablish its previous preeminence in the CPE market, contrary to the Commission's procompetitive policies.

23. Several parties also commented on the nature of the relief the Commission should, or could, provide to AT&T. ADAPSO argues that AT&T's request to keep CPE and enhanced services together in AT&T-IS, with CPE unseparated, represents the elimination of some of the structural separation requirements for enhanced services. It contends that such relief is outside the scope of the *Notice* and would violate the APA. Digital asks the Commission to make formal conditions out of certain of AT&T's representations as to how it plans to organize its business in the absence of structural separation. It contends that the Commission should require AT&T not to merge any AT&T-IS lines of business into AT&T-COM and should limit sales of CPE by AT&T-COM to the "incidental" CPE identified by AT&T in its comments. Digital argues that these conditions will deter AT&T from cross-subsidizing its unregulated operations.

24. Parties opposing relief[47] first contend that the Commission, contrary to its statements in the *Notice*, must address the question of AT&T's market power before determining whether to provide AT&T with relief from structural separation. These parties contend that AT&T still possesses significant market power with a 90% share of the inter-LATA toll market and a virtual monopoly over 800 service, terrestrial private lines, and international MTS. They argue that the revenues from AT&T's regulated activities exceed $30 billion and are more than sufficient to allow AT&T to cross-subsidize its unregulated offerings from its regulated operations, especially since the elimination of structural separation would produce significant common costs that AT&T could allocate to its regulated operations. Citing a study prepared by Booz, Allen and Hamilton and commissioned by GTE Sprint, they further argue that the Commission should not rely on inter-LATA competition to prevent cross-subsidization because such competition developed but recently and has dubious prospects. They assert that easy entry into this market is illusory,

[46] Bell Atlantic and NYNEX oppose such relief for AT&T.

[47] Some of the parties opposed to granting AT&T relief are ADAPSO, CCIA, General DataComm Corp., GTE Corp., IDCMA, Intecom Corp., NATA, and Tandy Corp.

and price competition is not necessarily an effective restraint on AT&T since many of its competitors resell its services and must pass on AT&T's price increases in their prices. Finally, the parties opposed to relief indicate that certain of AT&T's activities are particularly susceptible to cross-subsidization, including its data communications activities, its advertising and marketing, and its charitable contributions.[48]

25. In addition, opponents assert that AT&T possesses the functional equivalent of bottleneck facilities that would enable it to act anticompetitively. They argue that any CPE that is not compatible with the AT&T network is of little or no value. Furthermore, they assert that in many areas the BOCs merely provide transparent pathways to AT&T's network, and it is AT&T that sets the interconnect standards for CPE. NYNEX also suggests that because the vast majority of existing central office switches use AT&T software, AT&T has substantial power to set local network interconnection standards for CPE. These opponents contend that AT&T could use this power to disadvantage non-AT&T CPE and to develop new equipment to take advantage of new network services before its competitors can develop comparable products. They also contend that only AT&T private lines can meet certain technical standards for some data transfer applications, and, therefore, AT&T could use this source of market power to tie CPE purchases to the receipt of network service. In this regard, several parties assert that AT&T has a large backlog in private line installations, and cite this phenomenon as both evidence of AT&T's market power in this area and an opportunity for AT&T to discriminate against rival CPE by processing private line orders placed by its CPE customers more expeditiously than orders placed by, or on behalf of, its CPE competitors' customers.

26. Several parties also contend that not only does AT&T possess market power in network services, but it is increasing its market share in the CPE market. NATA and Bell Atlantic both contend that AT&T-IS's share of new CPE sales is beginning to grow and that AT&T may regain much of its former market power if the relief proposed in the *Notice* is granted. They suggest that current AT&T-IS practices, including its policy of enforcing

[48] In its comments Intecom charges that AT&T used a charitable gift to the University of Southern California to obtain a $17 million CPE contract with the University. Comments of Intecom Corp. (April 8, 1985) at 6-7. AT&T strongly disputes the facts asserted by Intecom, as well as its conclusions. AT&T Reply Comments at 26-27 n.*.

the termination charge provisions of its CPE leases when a customer terminates a lease early to buy new CPE from a source other than AT&T-IS, but waiving or providing a partial credit against such charges when the customer buys CPE from AT&T-IS, are having a significant adverse impact on the market.

27. As a final point, the parties opposed to AT&T contend that even if some of the benefits of structural separation have been reduced, the costs of structural separation from AT&T's CPE operations have also been significantly reduced. They argue that much of the cost of duplicative personnel and facilities was the result of inefficient organization by AT&T, and suggest that these costs will be greatly reduced or eliminated when AT&T completes the reorganization of its technologies sector and consolidates CPE operations in AT&T-IS. They also suggest that many of the costs of the structural separation requirements were eliminated when the Commission waived the Software Rule and certain personnel restrictions in the *Notice*. These commenters further argue that AT&T-IS's ability to resell basic services allows AT&T to offer its customers the single point of contact they desire, whicle ICA, a customer organization, makes the claim that "one-stop shopping" is of no great benefit. Finally, several commenters suggest that AT&T-IS is of sufficient size that it already possesses most economies of scale, and as it grows and expands into new businesses, it will be able to spread any costs that might still exist from structural separation over a large number of enterprises.

B. The Costs and Benefits of Structural Separation For AT&T's Provisions of CPE.

28. The structural separation requirements we established in the *Second Computer Inquiry* were a pragmatic attempt to fashion a set of conditions governing the relationship between dominant providers of regulated services and their unregulated affiliates so as to maximize the long-term welfare of consumers of communications services. The decision to adopt those requirements for AT&T's CPE operations was based on our judgment that the benefits they provided in protecting competitive markets from the potential for anticompetitive conduct, and ratepayers from the potential burden of improper allocations of costs to regulated services, exceeded any costs that may have been imposed on AT&T or on consumers. However, these requirements were never intended to be inflexible or unreviewable — a fact that has been

amply illustrated by the changes we have made in them over the last five years.[49] In the *Final Decision*, we found that: "The judgments embodied in this Order of necessity are premised upon existing and forseeable circumstances and upon available evidence .... Implicit in this effort, then, is the obligation to change the conditions, or to abandon the effort altogether, as experience and changed circumstances warrant."[50] We further indicated that "the cost/benefit analysis embodied in this decision cannot be fixed [and] must be recalculated from time to time to assure .... that important events have not caused a disequilibrium to develop."[51] We now believe that recent events in the telecommunications industry have created just such a "disequilibrium."

29. Over the last five years, a fundamental reality of the telecommunications industry has been its continual state of change. AT&T's divestiture of the BOCs pursuant to the *MFJ*, the final detariffing of AT&T's CPE operations, the implementation of the Commission's access charge plan (governing the compensation local exchange carriers receive for use of their facilities in completing interstate calls), and the conversion of BOC and other exchange carrier facilities to "equal access" are just four of the major developments in the last half-decade that have created a telecommunications environment far different from that which existed in 1980. AT&T no longer controls the lion's share of the local exchange facilities in this country, and the owners of those facilities, the BOCs, provide AT&T with potent competition in the CPE marketplace. AT&T's assets have fallen by more than two-thirds while its revenues have declined by over 50%, as the result of the divestiture.[52] Moreover, AT&T's former dominance of the CPE market place has been largely eliminated, and AT&T is beginning to experience significant competition with respect to many of its network services offerings. Finally, AT&T-TI (formerly Western Electric) has been forced to move away from providing equipment almost exclusively to captive affiliates, and now must compete in competitive markets for the large majority of its sales. In light of these significant changes, we now conclude that our structural separation requirements for AT&T's CPE operations no longer provide benefits to the public that exceed their costs, and, as a consequence, the underlying

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[49] *See supra* para. 11.

[50] *Final Decision*, 77 FCC 2d at 463, para. 207.

[51] *Id.*

[52] *See* American Telephone and Telegraph Company, 1984 Annual Report (1985) (total assets fell from $149,530,000 in 1983 to $39,827,000 in 1984, while revenues in 1983 totalled $70,319,000 compared with $33,188,000 in 1984).

rationale for imposing those requirements has been eroded.

1) The Benefits of Structural Separation

30. In the *Final Decision*, we indicated that the primary benefits of our structural separation requirements would be "protection for the regulated market ratepayer against costs transferred from the competitive market by the parent corporation, and protection for the general public against such anticompetitive activities as denial of access and predatory pricing."[53] In assessing the benefits of continuing our structural separation requirements, we will focus on the extent to which recent events have limited AT&T's ability to engage in these activities, and consequently obviated the need for such requirements.[54] We will also examine the extent to which the growth of competition in the provision of CPE has made that market less vulnerable to anticompetitive activities by AT&T.[55]

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[53] *Final Decision*, 77 FCC 2d at 463, para. 208.

[54] In the *Reconsideration Order*, we listed four characteristics of a carrier that would affect our decision to impose structural separation: 1) did the carrier possess the ability to engage in anticompetitive activity through the control of bottleneck facilities such as local exchange or toll transmission facilities; 2) did the carrier possess the ability to engage in cross-subsidization; 3) did the carrier integrate its common carrier activities with its affiliated entities, with particular emphasis on research and development, and manufacturing capabilities that are used in conjunction with, or supported by communications derived revenues; and 4) did the carrier possess sufficient resources to enter the competitive market through a separate subsidiary. *Reconsideration Order*, 84 FCC 2d at 72, para. 65. As we indicated in the *Notice*, these characteristics are only guidelines in an overall analysis of the costs and benefits of requiring structural separation for any particular carrier. In this Order we will discuss the first two of these characteristics in some detail, *see infra* paras. 31-35, and will implicitly address the third characteristic in our discussion of the first two. The final characteristic, AT&T's ability to afford the costs of structural separation, is merely a threshold condition to our initial decision to impose such requirements, and is not relevant to the cost/benefit analysis conducted here. Even assuming AT&T could afford to participate in the CPE marketplace subject to the structural separation requirements, the continued application of those requirements would ill serve the public interest if the costs thereby imposed exceeded the benefits that were realized.

[55] As noted *supra* para. 24, several commenting parties argue that we cannot properly analyze the costs and benefits of continuing structural separation for AT&T's CPE operations until we reach a determination on the extent of AT&T's interexchange market power in CC Docket No. 83-1147, Long-Run Regulation of AT&T's Basic Domestic Interstate Services, Notice of Inquiry, 95 FCC 2d 510 (1983). They contend that our statement in the *Notice* at para. 18 n.23, that we do not need to make a determination on AT&T's market power in interexchange services before eliminating separate subsidiary requirements is incorrect. While we recognize the parties' concerns that AT&T's market power not be ignored in this proceeding, we also do not find it necessary to resolve issues of how AT&T's interexchange services are to be regulated in the future,

31. When we adopted the structural separation requirements in the *Final Decision*, the first important benefit we hoped to achieve was to limit AT&T's ability to cross-subsidize its competitive ventures by improperly allocating some of the costs of those ventures to its regulated operations. Such improper allocations could unfairly burden ratepayers with costs not properly attributable to the regulated services they purchase and potentially allow AT&T to harm competition by pricing its competitive offerings below cost. We required structural separation to make any such cross-subsidization occur across corporate boundaries, thereby making such activity both more difficult to accomplish and, if attempted, more easy to detect. In light of recent events, we now see a significantly reduced ability on the part of AT&T to cross-subsidize its unregulated operations. The divestiture of its local exchange companies has removed from AT&T's control the most significant portion of its monopoly operations with which it could attempt such activities. Moreover, while it does offer some network services in which it still has a significant market position — *e.g.*, 800 service, international MTS, and certain types of terrestrial private lines — the advent of competitive alternatives has reduced its ability to shift the costs of competitive ventures to its network services without suffering some loss of market share.

32. In addition, the divestiture and the CPE reorganization have made the actual mechanics of cost-shifting far more difficult. The predivestiture AT&T could attempt to shift costs by allocating common costs of research, development, and manufacturing from its CPE products to the equipment it utilized in providing basic service. With divestiture, AT&T-TI no longer has a captive market for its products and is being increasingly subjected to marketplace checks on its prices. The BOCs are actively purchasing both network and terminal equipment from non-AT&T

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in order to resolve the issues raised in this proceeding. The principal question here is not whether AT&T has some overall market power that mandates continued Title II regulation, but whether the costs of a particular set of restrictions on AT&T outweigh the benefits for competition they provide. By necessity, in analyzing the costs and benefits of structural separation as compared to those of alternative regulatory regimes, we will examine certain aspects of AT&T's ability to use its position in one market to the detriment of competition in another. However, when we make determinations about the benefits of structural separation in deterring particular competitve abuses, we do not have to reach any all encompassing conclusions on AT&T's interexchange market power and the future regulation of AT&T's interexchange offerings.

sources,[56] requiring AT&T-TI to price such products competitively. Furthermore, AT&T indicates only 13% of its sales are to AT&T-COM;[57] thus, only a very small part of its total sales are of products that have no marketplace checks to aid in the detection of overpricing and cost-shifting.[58] The reorganization of all CPE operations into AT&T-IS[59] will also reduce AT&T's ability to shift costs. After the reorganization, the manufacturing and research and development costs incurred for CPE will be in AT&T-IS, and while AT&T-IS will not longer be required to remain separate from AT&T-COM, any such costs shifted from CPE to network equipment must cross a boundary that did not previously exist.

33. The second major benefit we hoped to achieve from the establishment of structural separation was to prevent AT&T from using its control over local exchange and interexchange bottleneck facilities to set interconnection standards that would benefit its own CPE products in a discriminatory manner, or to install and maintain basic transmission services in a manner that would discriminate in favor of its own CPE customers. With the divestiture, AT&T gave up its local facilities and lost much of the power it once had to set CPE interconnection standards and to discriminate against its competitors' CPE.

34. In this proceeding several parties have argued that even though it no longer controls local facilities, AT&T's control over interexchange facilities provides it with the same anticompetitive opportunities it had prior to divestiture. While we find merit in the argument that the interexchange network may provide AT&T with the ability to set interconnect standards in some cases, we also find that this capability has been substantially reduced from that enjoyed by the old Bell System, which effectively set all interconnect standards for the entire network. Moreover, in the post-divestiture environment, the BOCs are CPE competitors of AT&T and thus have a vested interest in ensuring that AT&T not provide superior network services to its own CPE. The entry of

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[56] Keller, *The Battle For the CO Market*, Communications Week at C1 (March 18, 1985).

[57] *AT&T Petition* at 9.

[58] As DOJ states in its comments:

> After this vertical integration is ended by the divestiture . . . if Western Electric attempted to cross-subsidize its CPE from its transmission and switching equipment, the correspondingly higher prices which would result for Western Electric's transmission and switching equipment would result in competitive losses for Western Electric in that market. DOJ Comments at 21 (quoting its response to *MFJ* Comments).

[59] *See* Sack, *AT&T To Transfer 6 Plants and 33,000 Workers to AT&T-IS*, Communications Week at 38 (June 3, 1985).

these competitors, who possess substantial expertise with network interconnection standards and own facilities that AT&T's CPE must be compatible with, provide a significant check on AT&T's ability to act anticompetitively. In addition, there is now a substantial base of existing non-AT&T equipment on customer premises. For example, approximately 55% of the installed PBXs in the country have been supplied by AT&T's competitors.[60] Attempts by AT&T to introduce network standards that are incompatible with the existing base of equipment could prove counterproductive and simply provide competitive opportunities for its network services competitors. Finally, as we intend to continue to require AT&T to disclose network information whenever any network change affects CPE interconnection,[61] the need for continued structural separation to deter AT&T from setting discriminatory CPE interconnection standards appears minimal.

35. Similar considerations apply to our concerns about AT&T's ability to provide superior installation and maintenance of network services for those end users who purchase its CPE. As AT&T is faced with competition in the provision of most network services, providing certain customers with preferential treatment might cause other customers to have their service delayed, and encourage them to switch to an alternate supplier of network services. While, as some parties argue, there is a backlog of orders for certain AT&T private line facilities for which AT&T could conceivably provide superior access to its own CPE customers, we do not believe the potential for such preferential treatment can justify applying the full range of structural separation requirements to AT&T. Rather, in our view, nonstructural safeguards are adequate to address this problem, and we provide such safeguards in this Order.

36. Implicit in our original analysis of the benefits of the structural separation requirements for AT&T's CPE operations was a concern that AT&T could, if allowed to operate without restriction, suppress competition and dominate the CPE market. This perceived "sensitivity" of these markets, and a decision to be very protective of the newly developed CPE competition, were important elements in calculating the benefits of structural separation. Had competition in those markets been more firmly established, the benefits we perceived in structural separation would certainly have been smaller. In examining the current state of competition in the CPE market, we conclude, contrary to the

[60] *See infra* note 63.
[61] *See infra* paras. 49–54.

assertions of some parties,[62] that competition is vigorous and strong. In the five years since we imposed the structural separation requirements, AT&T's CPE market shares have undergone a steady and rapid decline to the point where it cannot be said to "dominate" any particular segment of the CPE marketplace.[63] In light of this robustly competitive marketplace, our previous concerns that AT&T would be able to displace competition and reestablish a dominant position in CPE have been greatly reduced.

2) The Costs of Structural Separation

37. While it is clear that the benefits of continuing the structural separation requirements for AT&T's CPE operations have dramatically declined, it is much less clear that the costs associated with these requirements have been reduced to a similar extent. The most obvious cost of structural separation, the duplication of personnel and facilities, is estimated by AT&T to exceed one billion dollars. Although some of the costs of duplication have been reduced as a result of AT&T's reorganization of its technologies sector, our waiver of the Software Rule, and our waiver of the restrictions on personnel and recruiting services, AT&T estimates that more than two-thirds of these costs of duplication remain.[64]

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[62] *See supra* para. 26.

[63] In the *CPE Lease Order*, we analyzed the competitive balance in the PBX and key system markets in reaching a determination that certain AT&T contractual practices did not violate the Communications Act. In that Order we found that "the telecommunications market for PBXs and key systems is very competitive" and noted that AT&T's share of new PBX shipments has fallen from 45% in 1980 to between 19-26% in 1984. We also note that AT&T's share of new key system shipments fell from 58% to between 25-33% over the same period. One result of AT&T's market position in new shipments is a significant erosion in its share of U. S. -installed base of key systems and PBXs. Estimates indicate that, in 1980, equipment provided by AT&T represented 75% of the U. S. -installed key system base and 61% of the U. S. -installed PBX base, and that by 1984 AT&T's market share had declined to 57% of the key systems base and 45% of the PBX base. Moreover, the companies that have scored these impressive competitive gains on AT&T include some of the world's largest corporations with substantial financial, technical, and marketing resources. AT&T's main competitors include: Northern Telecome (21.2% of 1984 new PBX sales), Rolm (a wholly-owned IBM subsidiary with 18.4% of 1984 new PBX sales), ITT, NEC, Fujitsu, and Siemens. In addition, the BOCs have reentered the marketplace for CPE and provided a potentially potent marketing counterbalance to AT&T. *CPE Lease Order* at paras. 26-29.

[64] Bell Atlantic appears to argue that the fact that the structural separation requirements impose substantial costs on AT&T is actually a positive aspect of the rules. It contends that were those requirements removed, AT&T could be expected to pass through the resulting cost savings to its customers in the

38. In any event, these direct costs of structural separation may be less important in the long run than the inefficiencies structural separation creates in research and development, manufacturing, and marketing. In many multiproduct firms like AT&T there exist both economies of scale, which result from having a certain level of activities, and economies of scope, which result when there is an overlap in the inputs (*i.e.* materials, personnel skills, technology) that go into creating the firm's different products.[65] While the elimination of structural separation requirements will probably not create substantial new scale economies, to the extent that basic communications service and CPE have some overlap in their inputs, scope economies may result that could be realized in the absence of such restrictions. Moreover, it is clear that structural separation imposes restrictions on the free flow of information within AT&T, which could have a significant impact on the costs of developing and marketing new products. Finally, the restrictions on joint marketing prevent AT&T from engaging in the kinds of systems solutions that it, and many end users claim are necessary. Together these inefficiencies could have significant deleterious impacts on AT&T's ability to compete as effectively as possible in the CPE marketplace.

39. Furthermore, while much of the debate in this proceeding focuses on the effect of the structural separation rules on AT&T's CPE operations, it is likely that the increased costs imposed by these rules also affect AT&T's regulated services. The structural separation rules address the problem of joint and common costs by prohibiting, in effect, many joint and common activities. While this may provide protection against ratepayers bearing costs associated with competitive services, to the extent that there exist economies from joint operations, the separation rules impose on ratepayers extra costs resulting from the failure to realize these economies. Costs such as unnecessary duplication of facilities and personnel and sluggish or inappropriate responses to marketplace signals may just as easily manifest themselves in AT&T's regulated operations, in the form of higher prices and

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form of lower prices, which would place competitive pressures on Bell Atlantic and other providers of CPE. *See* Bell Atlantic Comments at 3. This argument confuses costs and benefits and reflects a fundamental misapprehension of the purposes of the structural separation requirements. We established those requirements to guard against possible anticompetitive conduct by AT&T and not simply to handicap its efforts by imposing inefficiencies on its operations for the benefit of its competitors.

[65] *See* Bailey and Friedlander, *Market Structure and Multiproduct Industries*, 20 J. Econ. Lit. 1024, 1031-1033 (1982).

reduced quality and variety of services, as in competitive operations.

40. In sum, the costs of structural separation, while not readily quantifiable in all cases, appear to impose a significant burden on AT&T and the public. In light of the reduced benefits of structural separation requirements, we conclude that those requirements are no longer justifiable for AT&T's CPE operations.

C. Relief From the Structural Separation Requirements for AT&T's CPE Operation.

41. Our analysis of the costs and benefits of the structural separation requirements imposed on AT&T's provision of CPE has indicated to us that the benefits they provide by reducing the potential for anticompetitive activites have been greatly reduced by recent events, while many of the costs have continued unabated. This realignment of the cost/benefit balance has led us to the conclusion that retaining these requirements is no longer in the public interest. Therefore, we relieve AT&T from the requirements of section 64.702 of our rules that it provide CPE only through a fully separated subsidiary. Pursuant to this decision, any of AT&T's unseparated corporate entitities will be permitted to provide CPE to end users, market CPE jointly with basic services, or otherwise organize their offerings of CPE without regard to the structural separation requirements established in the *Second Computer Inquiry*. This decision will still require, however, that AT&T's unseparated entities provide basic services on a dominant carrier bases.[66] Moreover, AT&T's provision of CPE, although free of structural separation requirements, will be subject to certain nonstructural safeguards designed to inhibit the potential for anticompetitive conduct.[67]

42. The relief we grant today for AT&T's provision of CPE does not extend to AT&T's provision of enhanced services,[68] and those

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[66] If AT&T engages in resale of network services through other than a subsidiary subject to full structural separation, it must do so on a dominant regulated basis.

[67] *See infra* paras. 46-77.

[68] In its comments AT&T requested that we allow enhanced services to remain in an unseparated AT&T-IS, together with CPE, but separated in some fashion from network services. *See supra* para. 21. The *Notice* is replete with disclaimers of any intent on our part to deal with enhanced servies in this proceeding. And a number of parties explicitly stated they had certain concerns about removing structural separation requirements for enhanced services, but in reliance on our representations in the *Notice*, withheld their comments until we initiated a proceeding addressing enhanced services issues. While we are sensitive to AT&T's enhanced services concerns and will address many of them

AT&T activities continue to be subject to the existing structural separation requirements.[69] Pursuant to our decision, the AT&T affiliate providing enhanced services will be required to remain fully separated from AT&T's other operations. AT&T would appear to be able to meet this requirement with at least two basic types of organizational structure: 1) it could keep enhanced services in a fully separated AT&T-IS; or 2) it could create a new separate subsidiary for enhanced services. These different organizational structures for AT&T have slightly different regulatory consequences.

43. If AT&T elects to keep its enhanced services offerings in AT&T-IS, it would, as indicated above, be required to keep AT&T-IS fully separated from AT&T-COM. AT&T-IS could continue to supply CPE, but such CPE activities would remain fully separated from AT&T-COM, as they are now.[70] In addition, since AT&T-IS and its CPE manufacturing capability would remain subject to full structural separation, AT&T-COM or AT&T-TI would be required to deal at arms' length with the CPE manufacturer. Moreover, since AT&T-IS would remain separated, its technical personnel would not be permitted to interact with their AT&T-TI and AT&T Bell Laboratories counterparts, except to the extent already permitted under the separation rules. Nor would AT&T-IS's maintenance and installation crews be permitted to work on basic services, although AT&T-COM or AT&T-TI

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in the *third Computer Inquiry*, *see supra* note 5, the relief it seeks would involve removing, in substantial part, the structural separation requirements from AT&T's offerings of enhanced services. This is precisely the type of relief we expressly stated we would not consider in this proceeding when we issued the *Notice*. In light of those statements, it is our view that under the notice and comment procedures of the Administrative Procedure Act, we are precluded from addressing such issues. *See* 5 U.S.C. § 553(b)(1982). Furthermore, we do not believe such an approach, *i.e.* resolving issues we explicitly represented would not be addressed in a proceeding, would be an appropriate way for this Commission to discharge its regulatory obligations.

[69] We also do not address the requests of the BOCs that they be provided relief in this proceeding. We explicitly declined to include the BOCs in this proceeding, *see Notice* at para. 14 n.17, and have indicated previously that we intend to review the Computer II structural separation requirements for the BOCs within two years of the BOCs' implementation of a separate structure in compliance with those requirements. *BOC Separation Order*, *supra* note 29, at 1140, para. 61. We have already initiated such a review with respect to enhanced service offerings by the BOCs in the Third Computer Inquiry proceeding. *See supra* note 5.

[70] If AT&T chooses to adopt this approach, it will be permitted to transfer some or all of its CPE and related operations from AT&T-IS to other parts of AT&T not subject to the structural separation requirements. We grant to the Chief, Common Carrier Bureau delegated authority to require such additional reports as are necessary to monitor the transfer process.

could provide joint CPE and basic services installation and maintenance. However, AT&T would, through AT&T-COM or some other unseparated affiliate, be able to undertake joint marketing initiatives for CPE and network services enabling AT&T to provide a single point of contact for its large customers.

44. If AT&T chooses to provide enhanced services through a new fully separated subsidiary, the structural barriers between AT&T's CPE operations and its unseparated affiliates would be eliminated. The new entity would take the place of AT&T-IS in the commission's regulatory scheme and would be able to do anything AT&T-IS can do now (*e.g.* sell CPE, resell network services, obtain software under the waiver, obtain administrative support).[71] An unseparated AT&T-IS could engage in joint sales, marketing, research and development, and support services with other unseparated AT&T affiliates. However, CPE would be separated from enhanced services by structural barriers.

45. In this Order we do not specify the exact manner in which AT&T should implement the structural separation requirements for enhanced services. Whether it decides to retain AT&T-IS as a fully separated CPE and enhanced services provider, creates a new fully separated subsidiary for enhanced services, or adopts some other organizational structure that maintains full separation for enchanced services, is a business decision we leave to AT&T's discretion.

IV. NONSTRUCTURAL SAFEGUARDS ON AT&T'S PROVISION OF CPE

46. In reaching our decision to remove the structural separation requirements pertaining to AT&T's provision of CPE, we have concluded that as a consequence of recent developments in the telecommunications industry, the costs of such requirements now exceed the benefits. While this conclusion is based in part on our finding that there has been a substantial decrease in AT&T's ability and incentives to act anticompetitively in its CPE operations, it is not a finding that there are no potential problems in that regard. AT&T is still treated by this Commission as a dominant carrier in its provision of network services, and nothing

[71] We will permit the new subsidiary to begin operations thirty days after receiving notice from AT&T of its intent to form such an entity, provided that at the time the new subsidiary's operation commences AT&T-IS's authority to offer resold basic services is transferred to the new entity, and provided that the total capitalization of the new entity does not exceed previously authorized levels.

we have said in this Order is intended to alter that status. As a dominant carrier, AT&T presumptively continues to possess some degree of market power and, accordingly, some ability to act anticompetitively in its CPE activities. Consequently, as a replacement for the stuctural separation requirements eliminated in this Order, we will impose certain nonstructural requirements on AT&T. We will require AT&T to adhere to a modified version of the existing network disclosure rules, file reports on its provision of basic services to subscribers who purchase CPE from its competitors, implement certain procedures with respect to the disclosure of customer proprietary information, submit a detailed accounting plan prior to the final implementation of relief, and contract for an independent audit of its operations under that plan. It is our view that these requirements are necessary to protect CPE competition and ratepayers in the absence of structural separation, and we intend that they be implemented conscientiously by AT&T. To that end, we will monitor AT&T's performance under these safeguards and will initiate appropriate proceedings should noncompliance be observed or the present safeguards prove inadequate. Conversely, it is not our intent that we simply substitute one set of costly and inefficient regulatory requirements for another. Thus, if experience and further industry developments demonstrate that these requirements, or some part of them, are unduly burdensome, we will act to modify them accordingly.

A. AT&T's Network Disclosure Obligations

1. Comments

47. In its comments AT&T contends that with the elimination of structural separation, the special requirements of the Commission's rules and the *Disclosure Order* will no longer be applicable, and it will be subject only to the disclosure requirements of the All Carrier Rule.[72] It argues that the power to set interconnection standards is now lodged almost exclusively in the BOCs and not in AT&T, although it does admit that there are "some cases in which the characteristics of the intercity network, rather than the local loop, may affect the interconnection standards for CPE used with certain private line services."[73] It also argues that its

[72] AT&T Comments at 22. For a discussion of the All Carrier Rule *see supra* note 19 and accompanying text.

[73] AT&T Comments at 19.

economic incentives are to make its network services available to as many different users (with all types of CPE) as possible. AT&T does state, however, that it will provide technical information six months in advance of the implementation of a new network service in those instances (which AT&T suggests would be rare) in which disclosure had not already been made by that time under the All Carrier Rule. It argues that at earlier points in time technical information is not sufficiently stable to be of use to CPE manufacturers in developing new products. Finally, it argues that requiring it to disclose market-related information would only benefit its network services competitors, and it indicates it plans to disclose this non-technical information only at the public announcement of a new network service.

48. A significant number of commenters oppose the AT&T position and contend that, even though AT&T no longer possesses local exchange facilities, it does have power to set interconnection standards for CPE. IDCMA presents four examples of network services where, it asserts, AT&T has the ability to set network standards with which CPE must be compatible if it is to function properly.[74] In addition, NYNEX notes that AT&T provides most of the software for the central office switches used by the BOCs and, consequently, has the ability to introduce new features in its software that could affect the interconnection and performance of CPE.[75] Therefore, these parties contend that unless technical information explaining changes in the network is provided with sufficient advance notice to develop new products, only AT&T-IS will be in a position to take advantage of new network services introduced by AT&T-COM. They further contend that six months does not provide sufficient advance notice since it often takes 12 - 36 months to develop and manufacture new CPE products. Several parties, including DOJ and IBM, suggest that a more appropriate trigger for disclosure would be the "make/buy" decision, the point at which under our existing rules any unseparated AT&T affiliate must disclose network information when it undertakes joint research with AT&T-IS. They argue that AT&T's make/buy decision should trigger disclosure in all cases in which network changes affect CPE interconnection. These commenters also strongly support the continued disclosure of market-related and implementation information, arguing that such infor-

[74] *See* IDCMA Comments (April 8, 1985) at 42-46. The examples are ACCUNET Packet Service, M-44 multiplexing service, switched digital network capability, and DDS with a secondary channel.

[75] NYNEX Comments (April 8, 1985) at 13-14.

mation is crucial to any decision on developing CPE for new network services.

2. Discussion

49. There is no disagreement in this proceeding that some form of network disclosure should continue. No party has advocated the elimination of all disclosure requirements, while many have supported retention of the existing standards. Even AT&T has not suggested that no disclosure is necessary. Moreover, we have clearly stated in previous orders our belief that AT&T's interexchange network can have an important impact on interconnection standards for CPE.[76] Therefore, the question presented here is not whether standards should exist, but what the timing and scope of network disclosure should be. We conclude that our existing disclosure rules,[77] with some important modifications, represent the best means to ensure that necessary network information will be transmitted in a timely fashion to the CPE vendors and manufacturers who require it.

50. Under our existing structural separation rules, two events can trigger a disclosure obligation on the part of AT&T. First, AT&T is required to disclose network information to the public whenever it is transmitted to AT&T-IS, or to a third party for the benefit of AT&T-IS.[78] Second, AT&T is required to disclose information at the point of a make/buy decision in cases where joint research is conducted by AT&T-IS and network services personnel.[79] We believe that this rule has adequately protected competition in the CPE marketplace by placing AT&T's CPE competitors in the same position as AT&T-IS with respect to acquisition of the network information required for the design of CPE. In the absence of structural separation, however, the first part of this rule, requiring disclosure when information is provided to AT&T-IS, will no longer provide a workable standard for the disclosure of network information, since there will be no required separation between CPE and network personnel. We could, as some parties suggest, continue to require that technical or other information be made public as soon as any person involved in the design, development, manufacturing, or marketing

[76] *See, e.g., Disclosure Order*, 93 FCC 2d at 1235-36, para. 29.
[77] *See supra* para. 8.
[78] *See id.*
[79] Disclosure as a consequence of joint research, however, appears to have been an infrequent occurrence.

of CPE was provided with such information;[80] however, such a rule might well require disclosure of information at a very early stage of the design process. In many cases, with the elimination of the structural separation requirements, CPE and network services technical personnel will be working within close proximity of one another or on the same projects. Thus, AT&T might well be required to disclose network information as soon as the CPE technical personnel learned a change was being contemplated. This could lead to premature disclosure of many of AT&T's preliminary plans for its network or, to avoid such a result, cause AT&T to reinstitute the types of artificial and inefficient restrictions on internal information flows that this Order seeks to remove. In either case, there could be significant adverse effects on AT&T's ability to innovate in its network.

51. We believe that a better approach to the disclosure problem is to take advantage of the second portion of our existing disclosure test and require disclosure of information on all changes to the network or new network services at the make/buy point, *i.e.* the point at which AT&T decides to manufacture a product itself or to provide it from a nonaffiliated entity. Therefore, once AT&T begins to engage in CPE activities on an unseparated absis, this disclosure obligation at the make/buy point will apply in all cases where network changes or new services affect CPE interconnection. This approach, by requiring disclosure as soon as AT&T has committed to a network services project affecting CPE interconnection, will permit CPE vendors and manuafactures to obtain information sufficiently in advance of the implementation of a new service to have CPE products on the market at implementation.[81]

52. There is, however, one important drawback to this disclosure requirement. Under the rule described above, AT&T would have no latitude to reduce its disclosure obligation by limiting AT&T-IS's access to information, but would be required to disclose at the make/buy point every time it makes a network change or introduces a new network service that affects CPE interconnection standards. Thus, even if the nature of the network change being contemplated made it imperative for legitimate business reasons that there be no early disclosure to AT&T's network competitors, AT&T would not be able to postpone

[80] *See* IDCMA Comments at 39.

[81] The network disclosure obligation we establih here is solely for AT&T and does not change the disclosure obligations for other carriers. Although this disclosure obligation relies on many concepts established in the *Disclosure Order*, to the extent that differences exist, the language here is controlling.

disclosure by keeping all information from its non-AT&T-COM affiliates.[82] We see this as an important limitation on AT&T's business discretion directly conflicting with the desire we expressed in the *Notice* not to place an undue burden on AT&T's research and development efforts by requiring it to disclose information at an earlier stage than do its network services competitors.[83] In order to avoid the possibility that our new disclosure requirements will unnecessarily inhibit AT&T's ability to innovate in its network, while at the same time providing AT&T's CPE competitors with timely technical and market information, we have decided to alter the manner in which AT&T will be required to disclose information once a make/buy decision has been made.

53. Under the network disclosure rule we are establishing today, AT&T will be required, at the time it makes a decision to manufacture itself or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface,[84] to notify the CPE industry (through direct mailings, trade associations, or other reasonable means) that a network change or new network service is under development. The notice need not contain technical information, but it must describe the proposed service with sufficient detail to allow the CPE industry to understand what the new service is and what its capabilities are. The notice must also indicate that technical information required for the development of compatible CPE will be provided to any entity involved in the manufacture, design, or sale of CPE[85] if, and only if, such an entity is willing to enter into a "nondisclosure agreement." This agreement may stipulate that such entity will use the disclosed information only for its CPE

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[82] In this situation, under our current disclosure rules, if AT&T did not provide information to, or engage in joint research with, AT&T-IS, or provide network information to other entities for the benefit of AT&T-IS, it would only be required to disclose pursuant to the All Carrier Rule.

[83] *Notice* at para. 29.

[84] Product in this context includes any hardware or software for use in the network which might affect the compatibility of CPE or enhanced services with the existing telephone network, or with any new basic network services or capabilities. Product also includes, for purposes of a make/buy determination, the development of any hardware or software that relies on the network interface. Thus, if AT&T makes a decision to develop a new type of CPE based on a planned interface, that decision will trigger the disclosure obligation. In applying the make/buy disclosure standard to both network services and CPE, we are adopting the same approach that we took in the *Disclosure Order*. *See Disclosure Order*, 93 FCC 2d at 1240-45, paras. 45-59.

[85] AT&T will not be required to provide information to trade associations or other organizations not directly involved in sales, design, or manufacture of CPE.

operations and will not provide such information to its non-CPE affiliates or to any third party. Once an entity has contacted AT&T and signed a nondisclosure agreement, AT&T must provide the full range of information required under our existing rules within a reasonable period,[86] but not to exceed 90 days. While we do not intend to specify the exact terms of a reasonable nondisclosure agreement, we believe that AT&T should design and make available to CPE providers as one option a "minimal" agreement. Such an agreement should be strictly limited to preventing the disclosure of the specific information released as a result of a particular notice and should not create any other relationships between the parties beyond those necessary to make the respective disclosure/nondisclosure obligations of AT&T and the other party effective and enforceable. We have no intention, however, of preventing the parties from mutually agreeing upon a broader relationship or nondisclosure agreement if they perceive it to be in their best interests. We intend that this disclosure requirement be implemented so as to provide entities in the CPE industry that require AT&T-COM network information with effective access to that information. We do not intend that AT&T's network services competitors be included in the disclosure process.[87]

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[86] *See Disclosure Order*, 93 FCC 2d at 1236-38, paras. 31-38, for a discussion of the information that must be disclosed under our existing disclosure requirements. We realize that some market information may be tentative or even unavailable at the make/buy point. Certain critical elements of market information, such as rate structure and price, are subject to review in the tariff process, during which objections may be, and often are, lodged that the proposed service is priced improperly under the standards of the Communications Act. Similarly, the timing of the introduction of a new service depends on a number of factors, including regulatory actions, that are, to a certain extent, out of AT&T's control.

[87] We model this new disclosure obligation on AT&T-COM's existing Vendor Liason Program (VLP), which has been implemented as a result of AT&T's cooperation with NATA's Interexchange Carriers Services Committee. The VLP provides CPE vendors with technical information on new and existing network services to aid CPE manufacturers in developing CPE for such services, and often provides information substantially in advance of any disclosure requirement in our rules. This program employs nondisclosure agreements to protect the confidentiality of information, both by AT&T-COM and CPE vendors, and appears generally to have been a successful venture. *See* AT&T Comments at 28-29; NATA Reply Comments at 20. AT&T has indicated in its comments that it plans to continue this program after the structural separation requirements are removed, and it notes that the program will be completely separated from any AT&T-COM CPE activities to protect the confidentiality of CPE vendors that use the program. Although we do not require AT&T to use the VLP to meet the disclosure obligations we are imposing, it may be appropriate for AT&T to use its experience with this program in fashioning a response to satisfy those obligations.

54. We recognize that there may be entities in the CPE industry that, for any number of reasons, are unwilling to enter into a nondisclosure agreement; thus, we think it desirable that there be a general disclosure obligation for AT&T that is not conditioned on the execution of such an agreement. AT&T has suggested that this point be six months prior to introduction of a new service or network change and that the obligation be limited to technical information. Although the record does provide some support for the position expressed by several parties that six months is generally too short a period to allow development of new CPE, AT&T argues that six months is merely a fallback requirement because in most cases it will have made public disclosure prior to that point pursuant to the All Carrier Rule. In light of the disclosure we require at the make/buy point and the continued application of the All Carrier Rule to AT&T, we do not think it necessary to extend our unconditional disclosure obligation back beyond the period suggested by AT&T. Accordingly, we require AT&T, it if has not already done so pursuant to the All Carrier Rule, to make all technical information available to the public at least six months prior to the introduction of a new service or network change that affects CPE interconnection and market information available to the public at the general announcement of the service or change.

B. Discrimination in Access to Network Services

1. Comments

55. Many commenting parties argue that AT&T could use its significant market presence in network services to improve its CPE sales by providing installation and maintenance of network services on a preferential basis to those AT&T-COM customers who purchase AT&T CPE. In particular, IDCMA contends that AT&T-COM has virtual monopoly over terrestrial private line service, which is critical for data communications, and therefore AT&T could leverage this market power to benefit its offerings of data communications equipment. It also points out that in 1984 AT&T-COM had an interstate private line backlog of 40,000 circuit orders, and that significant backlogs still exist for some services.[88] It argues that in the absence of structural separation, AT&T could provide more timely access to these facilities for its CPE customers. Other commenters argue that AT&T-COM could

[88] IDCMA Comments at 16 n.20.

also provide a superior quality of network service to AT&T CPE customers. General DataComm indicates that private line circuits are provided by AT&T-COM under tariffs that establish only minimum performance criteria and it contends that AT&T-COM could provide superior lines and facilities to those customers using AT&T CPE.[89]

56. Some parties argue that the only way to prevent AT&T from providing preferential installation and maintenance of basic services for its CPE customers is to require AT&T to process all network services installation and maintenance orders through centralized operations groups (COGs).[90] they maintain that COGs will insulate the installation and maintenance of network services from AT&T CPE sales personnel, thereby preventing preferential treatment on the basis of a customer's CPE purchases. Other commenters contend that a particular form of organization is not required, but AT&T should be required to report on the procedures it intends to use for processing installation and maintenance orders, and should include in those procedures a method for recording and tracking orders to allow the Commissions to monitor its performance.[91]

57. AT&T argues that its overriding economic incentive is to encourage the broadest possible use of its network services and that any strategy that would discourage customers with non-AT&T CPE from using those services would be counterproductive since it would drive these customers to competing service providers. AT&T indicates that it uses the same ordering and trouble-reporting procedures for its network services whether the subscriber has AT&T CPE or that of another vendor and states that it will continue to use these procedures if the structural separation requirements are eliminated. It argues that COGs or COG-like procedures are unnecessary because its incentives and existing programs will continue to ensure that all customers obtain the same network service ordering and provisioning support regardless of whose CPE they select.

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[89] General DataComm Reply Comments, Staff Analysis at 9.

[90] A COG is an organization established by a carrier to serve as a centralized point of contact for customers and vendors of CPE. COGs process orders for carrier basic services relating to the interconnection of CPE, including scheduling and coordination services. The BOCs are the only carriers currently required to utilize COGs. NATA Petition for Emergency Relief Requiring Nondiscriminatory CPE Interconnection, Memorandum Opinion and Order, FCC 84-132, para. 1 n.3 (released April 11, 1984).

[91] IBM Comments at 17.

2. Discussion

58. In the *Second Computer Inquiry*, we were very concerned that AT&T could use its control over "bottleneck" transmission services to provide superior access to its CPE customers, and our decision to require structural separation for AT&T was designed, in part, to prevent such behavior. While our concerns about possible discrimination have diminished substantially as a consequence of divestiture, we still perceive some potential, in the absence of any safeguards, for AT&T to provide its CPE customers preferential access to its regulated services in violation of sections 202(a) and 202(b) of the Communications Act.[92] This concern holds especially true for those AT&T services that are subject to substantial service delays or where AT&T has the capability to provide a superior quality of network service on a selective basis. Therefore, we agree with those parties who argue that some safeguards are necessary to prevent AT&T from providing its CPE customers with preferential installation and maintenance of network services. However, we conclude that a COG requirement or other procedurally oriented approach is not necessary, and instead we intend to follow a result oriented approach to ensure that AT&T does not discriminate in its provision of network service.

59. To prevent AT&T from actually providing discriminatory access to its network services, we require AT&T to file with the Commission, within 30 days of the release of this Order, its procedures for determining how requests for installation and maintenance will be processed.[93] To ensure that such processing does not vary depending on a customer's CPE purchases, we require AT&T to file monthly reports on the time periods required for installation and maintenance of its network services by the type of CPE (AT&T v. non-AT&T) an end-user possesses. We believe this result-oriented approach will require a minimal intrusion into AT&T's existing order processing procedures, but will also effectively prevent AT&T from providing discriminatory access to network services, since any such discrimination by AT&T should manifest itself in the filed reports.[94]

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[92] 47 U.S.C. § 202(a)-(b).

[93] We will subject this plan to the same review procedures that we are establishing for AT&T's accounting plan. *See supra* note 107.

[94] We regard such monitoring to be an effective check on potential abuse, and we direct AT&T in its report on its processing procedures, to be filed in 30 days, to explain how it will provide such information.

60. We are also concerned about the possibility, raised by some commenters, that AT&T sales personnel might make claims that by purchasing AT&T CPE the customer will obtain installation or maintenance of network services of a superior quality, or more quickly, than if the customer purchases CPE from another vendor. It is clear, however, that under the standards of the Communications Act and this Order, such representations would be false and improper. We expect that a party, having been apprised of its obligations under the Communications Act and our rules, will comply with them, and we anticipate that AT&T will take the necessary steps to ensure that such misrepresentations by its sales force about its ability to discriminate will not occur.

61. We wish to make clear that we consider this to be a particularly sensitive area and we will view with deep concern any indications that AT&T is employing preferential treatment in its provision of network services to benefit its CPE operations. Moreover, should there emerge a verifiable pattern of preferential treatment by AT&T, or of claims by sales personnel that preferential treatment is available, we will reevaluate whether more substantial regulation of AT&T's practices is required.

C. Customer Proprietary Information

1. Comments

62. A number of parties argue that the removal of the structural separation requirements would inappropriately eliminate the existing rule prohibiting AT&T from providing its separate subsidiary with proprietary customer information, unless such information is available to the public on equal terms and conditions. CBEMA contends that allowing AT&T's CPE sales personnel to have access to a customer's network information will enable them to identify a customer's CPE requirements and "get in the door with an early proposal,"[95] while Digital argues that such access would provide AT&T's CPE operations "with a unique competitive advantage in customizing integrated CPE and information processing offerings. . . ."[96] IDCMA notes that sales costs for its members amount to 20% of gross revenue on average, and 80% of these costs are incurred in identifying

[95] CBEMA Reply at 21.
[96] Digital Comments at 16.

potential customers.[97] It argues that should AT&T-IS obtain access to customer network information, AT&T-IS's costs of identifying potential customers will be significantly reduced, which will provide it with an unfair advantage over its CPE competitors. Finally, General DataComm contends that a number of companies design data networks using AT&T private lines and non-AT&T CPE (which they provide the customer). When such a company places an order with AT&T-COM for private line facilities on behalf of a customer, AT&T-COM is made aware of the nature and design of the proposed network and would be able to offer alternative packages of network design and CPE to the customer, even though that customer may never have approached AT&T-COM. General DataComm maintains that this is an unfair competitive advantage flowing to AT&T from its near monopoly control over data-quality private lines.

63. AT&T contends that the present restriction on its providing customer proprietary information to its CPE subsidiary is an adjunct of structural separation and will not, and should not, apply after it is permitted to offer CPE on an unseparated basis.[98] AT&T does, however, indicate that it will continue its current policy of making such customer proprietary information available to other CPE vendors if a customer so requests or authorizes.

2. Discussion

64. As all the parties agree, once the proposed relief is granted, our rule prohibiting carriers from providing customer proprietary information to their separate subsidiaries, unless such information is made available to the public on equal terms and conditions,[99] will no longer apply to AT&T's CPE operations. Consequently, if we do not modify our rules, AT&T-COM will be permitted to provide customer proprietary information to AT&T CPE sales personnel. The two most effective means of preserving equal access to customer proprietary information by all CPE vendors are: 1) prohibiting AT&T's CPE affiliate from obtaining access to such information; and 2) requiring AT&T to disclose such information to all CPE vendors if it is disclosed to AT&T CPE sales personnel. However, in the absence of structural separation, neither of these approaches would be effective. AT&T has indicated that it plans to offer a single point of contact to its

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[97] IDCMA Reply Comment at 48-49.
[98] AT&T Comments at 26 n.*.
[99] 47 C.F.R. § 64.702(d)(3).

large (and perhaps, eventually, medium-sized) business customers for all their network services and CPE needs. Under this type of sales organization, AT&T's CPE sales personnel will also sell network services to large business customers and will have a legitimate need for access to customer proprietary information dealing with network services. To prohibit AT&T from offering a single point of contact would eliminate one of the benefits to AT&T of removing structural separation, and we are unwilling to so limit the relief we are granting in this Order. Moreover, given that AT&T's CPE sales personnel will have access to all customer proprietary information under this plan, providing equivalent access to all CPE vendors would require AT&T to make all its large customers' information public. Since this information belongs to the customers, and many may not want it to be made public, this approach is also unacceptable.

65. While there is no easy means of providing all CPE vendors with equal access to customer proprietary information, the problems attendant with imperfect access may not be as great as some commenters indicate. The AT&T-COM customer information that would be most valuable to a CPE vendor is that from large corporations with complex telecommunications systems, since these are the customers that make the most significant use of the interexchange network. However, these are also the customers that are most likely to be sophisticated telecommunications consumers. An early contact on CPE purchases by AT&T will not necessarily result in an immediate sale for AT&T, but is more likely to result in customer-initiated contacts with other CPE vendors to elicit counteroffers. Thus, allowing AT&T CPE personnel access to customers' network information does not appear to be a significant problem for large customers. Furthermore, while certain smaller business customers may not be as sophisticated in their telecommunications purchases, they have network information that is, in most cases, less valuable to CPE vendors. These customers often have only limited contact with AT&T-COM and the most valuable customer information is that possessed by the BOCs and the customer's current CPE vendor. Thus, as was the case with larger businesses, the problem of unequal access to customer proprietary information may not be as significant as the commenters suggest.

66. While we have concluded that it is unnecessary and inappropriate to perpetuate a modified version of our present rules restricting access to customer proprietary information for AT&T's CPE operation once structural separation has been

eliminated, the record does support establishing two requirements in this area. First, in some cases, AT&T will possess information on a customer's services that a competing CPE vendor will need to design a communications system, or prepare a competing bid, for the customer. Thus, AT&T must make customer proprietary information available to competing CPE suppliers, at the customer's request. AT&T states that this is its current practice, and we are simply requiring it to continue to do so once the structural separation rules are removed for its CPE offerings. Second, there may be some instances in which AT&T-COM customers will not want their proprietary information passed on to AT&T CPE personnel. This situation might arise because the customer placing the order is actually a CPE vendor that designs data networks using AT&T private lines and does not want its network design/CPE information available to non-AT&T-COM employees whose job it is to market competing systems and products. Or the end user itself might not, for its own reasons, desire to have its proprietary information passed on to AT&T personnel who will use the information for marketing purposes having nothing to do with processing its order for network services. Whatever a customer's motivation, we conclude that those customers who desire to have their proprietary information available only to network services personnel should be able to obtain network services on that basis.

67. To create an environment where customers who request confidentiality for their proprietary information can obtain it, we require AT&T to limit access to the network information of customers who request such confidential treatment to network services personnel who have no involvement in CPE sales. We also require AT&T to file with us, within 30 days of the release of this Order, a description of the procedures it proposes to establish to limit access to customer proprietary information.[100]

D. Accounting Procedures

1. Comments

68. In response to a request in the *Notice*, AT&T filed in its comments a description of the accounting techniques it would use to identify and allocate costs between its regulated and nonregulated businesses if relief from the structural separation

[100] We will subject this plan to the same review procedures that we are establishing for AT&T's accounting plan. *See supra* note 107.

requirements were granted. It indicates that new accounting procedures would be required for only two situations: (i) combined or coordinated activity between AT&T-IS and other AT&T entities (*e.g.*, marketing, billings, or installation and maintenance), and (ii) the provision of CPE by AT&T-COM in conjunction with network services.[101] AT&T filed two accounting plans to address concerns raised by these potential new activities.

69. AT&T indicates that its outline of procedures for combined activities is substantially identical to procedures this Commission has previously approved. It suggests that the costs associated with combined functions will be assigned as follows:

> a. costs incurred specifically for a single entity [primary costs] will be directly asisgned to that entity;
>
> b. costs that cannot be directly associated with a specific entity [common costs] will be allocated between those entities that benefit from each activity, on a basis that reflects the benefits to each from the activity.[102]

Each combined activity will have a specific function code, and primary and common costs will be recorded by a particular combined function code. Determination of whether costs are primary or common will be made by individual organizations within AT&T.

70. AT&T-COM indicates that the accounting plan it filed for its provision of CPE[103] meets existing Commission standards for other carriers not subject to structural separation. Under AT&T's proposed accounting system, costs are recorded within each jurisdictional area (48 states, D.C., interstate, and nonregulated activities), and complete detail is provided on the nature of expenses by function performed, relevant business purpose, and exact type of expense. AT&T states that the nonregulated jurisdiction will have costs reported for three purposes: (1) to isolate investment dedicated to nonregulated CPE activity from regulated investment; (2) to account for revenue associated with CPE; and (3) to identify expenses related to nonregulated CPE activity. AT&T asserts that expenses for CPE will be assigned directly where possible, and joint and common costs will be

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[101] AT&T Comments at 15.
[102] *Id.* at App. A, p.2.
[103] *Id.* at App. B.

allocated on the basis of certain allocation factors.

71. Several parties, including IBM and NATA, contend that AT&T's proposed accounting procedures lack sufficient detail for the Commission to determine their adequacy. IBM argues that the accounting plans AT&T has filed in this proceeding are not as detailed as those the Commission has required, and AT&T has filed, in the past for allocating joint and common costs between regulated and unregulated activities (it cites AT&T's plans for joint research and development by Bell Laboratories and for sharing administrative services between AT&T-IS and other AT&T affiliates). NATA contends that the plans do not adequately define which costs are to be directly assigned to regulated or nonregulated accounts. NATA also argues that the plan does not commit AT&T to keeping accurate transaction and time records and suggests that all AT&T employees involved in joint activities should be required to keep accurate time records or their salaries should be assigned to nonregulated accounts. NATA further contends that not enough information on allocation factors is presented, except in the case of generic advertising, where it suggests the factor used — relative revenues from regulated and nonregulated activities — is flawed. Finally, NATA argues that because of the difficulty in allocating joint marketing and research and development costs, such costs should be completely assigned to nonregulated activities.

72. General DataComm and CBEMA also take the position that joint marketing costs should receive special Commission attention. CBEMA argues that the allocation of such costs to regulated services would unfairly burden ratepayers. General DataComm asserts that in the data equipment business, marketing costs usually amount to 20–25% of gross revenue, while profit margins are only 10–11% of revenue. Thus, it argues, a misallocation of such costs could allow AT&T to undercut the competitive position of other manufacturers of such equipment, possibly driving many out of the market. It also argues that such a misallocation would be relatively easy for AT&T to achieve in this market because of the imbalance between CPE costs, which amount to only 10% of a data communications system, and network costs, which represent 90% of the total. Accordingly, General DataComm assets, AT&T could misallocate a substantial portion of its CPE costs with only a relatively minor impact on

its regulated, network services costs.

73. Digital is also concerned about marketing costs and points specifically to the difficulties involved in allocating the costs of an account manager's time between network services and CPE and the costs of preparing joint CPE/network services bids, as particular examples of the problems in this area. Digital also argues that it is very difficult to allocate: (1) costs of maintenance personnel who repair both network services and CPE; (2) joint legal expenses; and (3) joint research and development expenses.

74. Several parties indicate that no relief should be granted until a detailed accounting plan has been developed and reviewed by the Commission's Staff. Others suggest that such a plan should be subject to a yearly audit by an independent accounting firm at AT&T's expense. They argue that the Commission lacks the resources to perform a detailed evaluation of AT&T's activities, even though such an evaluation is crucial to preventing AT&T from subsidizing its regulated services.

B. Discussion

75. One of our primary considerations in the *Second Computer Inquiry* was to prevent AT&T from engaging in improper cross-subsidization by shifting costs associated with its competitve offerings to its regulated activities. Such cost-shifting, we found, might distort the market for CPE and enhanced services and unfairly burden ratepayers of AT&T's regulated services. This concern with the potential for cross-subsidization was a prime motivating factor underlying our decision to impose structural separation on AT&T. In the current environment, with the divestiture of the BOCs from AT&T and the growth of competition in interexchange services, AT&T's ability to cross-subsidize clearly has been diminished.[104] However, even in the current environment, we agree with General DataComm that there remains the possibility that AT&T retains some ability to cross-subsidize its unregulated activities from those network services in which it still has market power (*e.g.* 800 service, terrestrial private line service, and international MTS and perhaps, in the short run, even domestic MTS).

76. To reduce or eliminate AT&T's potential for cross-subsidization, the Commission indicated in the *Notice* that AT&T should "[d]escribe the accounting systems and techniques [it] would use to identify and allocate costs between regulated and

[104] *See supra* paras. 31–32.

unregulated businesses if the structural separation requirements were eliminated."[105] The two accounting plans AT&T filed in response to the *Notice*[106] are basically consistent with the accounting principles established in the *Fifth Order*, for carriers not subject to a separate subsidiary requirement. However, even though the plans are consistent with the *Fifth Order*, we believe that AT&T is not in the same competitive position as those other carriers, and conclude that the concerns raised by the commenters require us to obtain a more detailed accounting plan from AT&T.

77. Therefore, we require AT&T to provide the Commission with a more detailed plan to account for its CPE activities once the structural separation rules are eliminated for those activities. Actual elimination of the structural separation requirements should not be implemented by AT&T until an acceptable plan is filed with the Common Carrier Bureau addressing the concerns discussed herein.[107] In AT&T's more detailed plan, it should include a listing and description of all services that will be

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[105] *Notice* at para. 30(5). Although at the time of the *Final Decision* we found that accounting would only be an effective policy for preventing cross-subsidization by AT&T if linked with structural separation, we now find, in light of the developments in the telecommunications industry in recent years, that such linkage is no longer required. For example, in the *Final Decision*, we referred to the utility of structural separation when "a carrier has the incentive and ability to engage in sustained cross-subsidization, or predatory pricing." *Final Decision*, 77 FCC 2d at 464, para. 210. But, as we noted *supra* paras. 31-32, the developments in the industry since the adoption of the *Final Decision* have significantly reduced AT&T's incentives and ability to engage in these practices, and consequently increased the efficacy of accounting as a means of preventing cross-subsidization. Furthermore, as demonstrated by the Fifth Report and Order in CC Docket No. 81-893, 49 Fed. Reg. 46,378 (Nov. 26, 1984) (hereinafter *Fifth Order*), *reconsideration pending*, we recognize the utility of accounting to guard against cross-subsidization by carriers that are providing both regulated and unregulated services and products. The question then is not whether accounting is an appropriate measure to guard against such cross-subsidization by carriers — it clearly is — but whether a particular carrier's market position justifies the further safeguards provided by structural separation requirements. In 1980 we concluded that AT&T's position at the time did justify the imposition of those additional requirements. In this Order we conclude that such justification is now lacking for the current AT&T.

[106] *See supra* paras. 68-70.

[107] The Bureau will conduct an initial review of the plan, prior to the implementation of relief, and may approve the implementation of relief if it determines that the plan meets the essential criteria discussed in this Order. Subsequently, a detailed review will be conducted with an opportunity for interested parties to comment. As stated in the text, the accounting plans already filed by AT&T in this proceeding are generally consistent with the principles of the *Fifth Order*, and what we are requiring is more detailed information on how those principles will be applied, not a basic restructuring of the plans. Should certain details of the plan prove inadequate, subsequent staff review, appropriate modifications, and a "true up" should serve to prevent any cross-subsidization potential not adequately addressed in the plan.

provided by AT&T for its CPE affiliate, a list of all plant and expense accounts involving joint and common costs between its regulated and unregulated operations, and the allocation methodology to be employed in each instance to assign these costs. We are especially concerned with the allocation factors AT&T will employ in its plan, and require it to respond to the specific concerns raised by the commenting parties.[108]

78. We also require AT&T to submit the operation of its accounting plan to an annual audit by an independent accounting firm, at its own expense. This annual review should concentrate on the allocation methods used by AT&T to ensure compliance with the accounting plan filed with the Commission. We believe that in light of the substantial demands already placed on the Commission's limited resources to undertake detailed investigations or audits of carriers' actual accounting practices, such as independent audit is the best means of assuring that AT&T conscientiously applies its accounting plan after the structural separation requirements have been removed.

V. ORDERING CLAUSES

79. Accordingly, IT IS ORDERED That, pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403, and 404, of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 218, 220, 403, and 404, the policies, rules, and requirements set forth herein ARE ADOPTED.

80. IT IS FURTHER ORDERED, That the motion for leave to file late comments filed by the Department of Justice IS GRANTED.

81. IT IS FURTHER ORDERED, That the motion for leave to file late comments filed by the International Business Machines Corporation IS GRANTED.

82. IT IS FURTHER ORDERED, That the motion to Compel American Telephone and Telegraph Company to Respond to the Commission's Questions filed by the North American Telecommu-

[108] *See supra* paras. 71-73. For example, with respect to marketing and sales expenses for AT&T-COM's provision of "incidental" CPE used in private line data networks, we would expect that the allocation factor employed not be based on relative revenues or assets, but on some factor that more closely approximates actual benefits accruing to the regulated and unregulated activities. We also expect that the plan will respond to NATA's concerns that AT&T keep accurate records and use actual transaction records, rather than estimations, wherever practicable.

nications Association IS DENIED.

83. IT IS FURTHER ORDERED, That the motion for the Federal Communications Commission to Accept NATA's Economic Analysis filed by the North American Telecommunications Association IS DENIED.

84. IT IS FURTHER ORDERED, That the motion For an Evidentiary Hearing and For Oral Argument filed by the North American Telecommunications Association IS DENIED.

85. IT IS FURTHER ORDERED, That the Conditional Motion For Adherence To Normal Rulemaking Procedures, Or, In The Alternative, For Stay filed by the North American Telecommunications Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

* Appendix A-may be seen in FCC's Dockets Branch, 1919 M Street, N.W. Washington, D.C. 20554.

Application, for Review
Tariff, Revision of
Commission denied several applications for review of its Block of Time Order. The applications for review sought reversal of the Bureau's June 6, 1984 order, and requested that the Block of Time plan be declared unlawful and removed from AT&T's tariff. Commission denied applications for review because provisions of Block of Time Order would benefit the public.
—*AT&T Co.*

FCC 84-562

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of	
American Telephone and Telegraph Company	Transmittal No. 173
Revision to Tariff F.C.C. No. 259 (WATS) for Advanced 800 Service	

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 1984; Released: November 30, 1984

BY THE COMMISSION:

1. On August 20, 1984, the American Telephone and Telegraph Company (AT&T) filed Transmittal 173 proposing revisions to its Wide Area Telecommunications Service contained in Tariff F.C.C. No. 259. These revisions, scheduled to become effective November 18, 1984, would allow AT&T to offer new 800 service features and would make minor revisions to other existing 800 services.[1] We conclude that one of the new service features being offered, Call

[1] MCI Telecommunications Corporation (MCI) has filed a petition to reject or alternatively, to suspend and investigate the proposed tariff, arguing that AT&T has provided insufficient economic justification and cost support information to justify the offering. AT&T, in its reply, argues that it has fulfilled all of the Commission's requirements and requests that MCI's petition be denied.

Prompter, could encompass the provision of an enhanced service within the meaning of our Computer II decisions, and that its offering under tariff would violate our Rules.[2] We therefore reject the tariff revisions for the Call Prompter service as described in Transmittal No. 173.[3] However, we find that if Call Prompter could be limited to the mere provision of a routing service, it may appropriately be tariffed.

BACKGROUND

2. AT&T describes the operation of the Call Prompter service as follows: a caller dials the subscriber's 800 number; an AT&T network device intercepts the call and responds with a recording that presents a list of up to 10 services available from the subscriber along with a corresponding code for each service; the caller selects and dials the proper code to be connected to an answering station providing the service of his choice. AT&T indicates that the customers it expects to serve with Call Prompter are organizations with widely separated premises, offering more than one service and wishing to use a single calling 800 number. AT&T indicates that the "in network" routing provided by the service will improve the efficiency of the subscriber's "800" access lines. AT&T initially proposed "Call Prompter" service in its Application No. 89 filed with this Commission on July 3, 1984. AT&T sought special permission to waive the requirements of Section 61.58 of our rules in order that the service might be provided on less than one day's notice. The reason given for the request was to satisfy the urgent requirements of a specific customer.[4]

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[2] Amendment of Section 64.702 of the Commission's Rules and Regulations 77 FCC 2d 384 (1979) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981) (Further Reconsideration), *aff'd sub nom.*, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied sub nom.*, Louisiana v. United States, 103 S. Ct. 2109 (1983) (Computer II).

[3] AT&T may revise and re-submit the transmittal for the purpose of offering the non-Call Prompter services.

[4] The specific customer indicated in AT&T's special permission application is a large hotel chain that normally used its 800 service lines to accept room reservations. When it implemented a promotional "call in" campaign using the same 800 numbers, the resulting call volume associated with the campaign caused undesirable queuing problems for its reservation calls. By implementing Call Prompter service, all dialed calls using the same 800 number would be intercepted at an AT&T premise and directed to the reservation office or the advertised promotional service. The resulting shift of promotional calls to different access lines would then alleviate the undesirable queuing problem for reservation calls.

3. The Bureau denied AT&T's request for special permission in a letter dated July 19, 1984. In that letter, the Bureau indicated that the service as described appeared to be enhanced within the meaning of our Computer II decision and might, therefore, be in violation of Section 64.702 of our Rules. AT&T was requested to clarify the nature of the service but, in the interim was granted a temporary waiver of the rule until August 30, 1984.[5] in order that the service might be provided for the special situation described in AT&T's filing.[6] In its August 8, 1984 clarification letter, AT&T responded to the Commission more fully describing the 800 services it seeks permission to provide and also arguing that the Call Prompter service performs only call routing and is, therefore, a basic service.

DISCUSSION

4. In our Final Decision in Computer II we set forth a requirement that communications services be classified as either "basic" or "enhanced" and that AT&T offer enhanced services only through a separate subsidiary.[7] In our Reconsideration we noted that: "many enhanced services feature voice or data storage and retrieval applications, and thus in an enhanced service the contents of the [users] information need not be changed but may simply involve . . . interaction with stored information."[8]

5. From the description provided by AT&T in its August 8 letter and as proposed in Transmittal No. 173, we conclude that the Call Prompter service proposed by AT&T involves some interaction with stored voice information in the provision of "in network" call routing.[9] We additionally believe that the proposed

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[5] The Bureau's letter of August 24 further extended the waiver until October 4, 1984.

[6] Similarly, on October 11, 1984, a temporary waiver was also granted until November 18, 1984 to AT&T in order that it might provide the Call Prompter service to a U.S. Government Agency.

[7] 77 FCC 2d at 416.

[8] 84 FCC 2d at 54.

[9] Caller interaction is here characterized by the implied question/reaction nature of the recorded Call Prompter message format, *i.e. IF* [condition] *THEN* [dial (x)]. In this case [condition] takes the form of a menu of alternative options from which the caller is asked to react by making an appropriate dial selection. *e.g. IF* [you wish: (reservations) or (promotions) or . . .] *THEN* [dial (a) or (b) or . . .]. As evidenced in the above example, the Call Prompter service proposed by AT&T possesses characteristics similar to those provided by answering services or department store information telephone numbers which give, after call completion, recorded announcements of the various departments in the store and the telephone number for each department. With Call Prompter, the customer's premises.

tariff offering contains few controls which would prevent subscribers from implementing Call Prompter as an enhanced service, with little or no in-network routing. For example, there are apparently no restrictions to prevent media related information from being embedded in the Call Prompter recording, nor are there any restrictions to prevent subscribers from implementing other applications than in-network routing.[10] Given the "open ended" nature of this offering we must conclude that the Call Prompter service is described in Transmittal No. 173 could permit the provision of enhanced services within the meaning of our Computer II decisions and may not be offered under Section 64.702 of our Rules, 47 C.F.R. § 64.702, without a waiver. We do not, however, preclude the possibility that the mere provision of a call routing service could be a basic service which appropriately could be offered under tariff. As this order does not apply to the other non-Call Prompter services or modifications proposed in the transmittal we will waive Sections 61.58 and 61.59 of our Rules and require AT&T to remove the rejected material.

6. The Commission recognizes that Call Prompter implemented as an in-network routing service can provide public benefits. In that form Call Prompter can offer conveniences to the public, economic advantages to the subscribers (which may also be passed on to the public), and tends to reduce network investments.[11] AT&T may wish to revise and if appropriate request waivers for the Call Prompter offering in a manner that takes into account our concerns. We would expect such a revision to better define and restrict the applications of the Call Prompter service to those implied in AT&T's August 8 clarification letter.

7. Accordingly, IT IS ORDERED that, to the extent indicated, the petition of MCI Telecommunications Corporation IS GRANTED and the tariff revisions proposed by the American

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[10] As proposed, the service could be extended so that caller dial selections could reach other menus. It would be then possible to provide automated diagnostic, data collection, or game services by phone. For example, a medical diagnostic service might begin with: *IF* [your symptoms predominantly are: (headache) or (stomach and intestinal) or (ear, eye, nose or throat) or . . . /*THEN* [dial (a) or (b) . . .]]. On making a dial selection the caller could be connected to a second recording which might have a menu that further narrowed the symptoms. This process could be continually repeated until either the diagnoses was completed and the caller was informed of his ailment (by recording) or the recording suggested or recommended treatment.

[11] Routing traffic from within the network during call set up can minimize the amount of "backhauling" necessary when compared with routing traffic after call completion from outside the network. Any reduction of traffic within the network tends to reduce the costs of the network.

Telephone and Telegraph Company under Transmittal 173 ARE REJECTED.

8. IT IS FURTHER ORDERED that for the purpose of revising the proposed tariff language to remove references to the Call Prompter service, sections 61.58 and 61.59 of the Commission Rules, 47 C.F.R. §§ 61.58, 61.59, are waived and Special Permission No. 84-798 IS ASSIGNED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Computer II
Tariff, Rejection of

Commission granted MCI's petition and rejected AT&T's tariff revisions under Transmittal No. 173. Commission also ordered that the purpose of revising proposed tariff language to remove references to Call Prompter service, Sections 61.58 and 61.59 of Rules, 47 C.F.R. Sections 61.58, 61.59, are waived and Special Permission No. 84-798 assigned. Commission found that Call Prompter service could encompass provision of enhanced services within meaning of Computer II decisions, and that its offering under tariff would violate Commission's Rules.
—*AT&T Communications*

FCC 84-563

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AT&T COMMUNICATIONS, INC.	Transmittal No. 79
Revisions to Tariffs F.C.C. No. 263 and F.C.C. No. 1	

MEMORANDUM OPINION AND ORDER

Adopted November 21, 1984; Released: December 31, 1984

BY THE COMMISSION:

1. The Commission has before it several applications for review of *AT&T Communications, Inc.*, Mimeo No. 4711 (released June 6, 1984) (hereinafter *Block of Time Order*).[1] By that order, the Chief,

[1] Applications for review were filed by the Association of Long Distance Telephone Companies (ALTEL), General Communications Inc. (GCI), GTE Sprint Communications Corporation (GTE Sprint), Lexitel Corporation (Lexitel), MCI Telecommunications Corporation (MCI) and the United States Department of Justice. AT&T Communications, Inc. (AT&T) and the National Telecommuni-

Common Carrier Bureau denied petitions seeking rejection or suspension of AT&T's "Block of Time" optional calling plan, thus allowing the tariff revisions incorporating the proposed plan to become effective on the scheduled date of June 7, 1984. The applications for review seek reversal of the Bureau's order, and request that the Block of Time plan be declared unlawful and removed from AT&T's tariffs. For the reasons stated below we deny these applications for review.

I. Background

2. AT&T's Block of Time plan (marketed as "Reach Out America") is essentially a billing arrangement that allows AT&T customers to purchase Message Telecommunications Service (MTS) calling on an hourly basis, as opposed to a per minute basis. Under Option A, for a minimum charge of $10.00 per month, customers may use up to one hour of interstate MTS calling in the night/weekend rate period. Additional night/weekend calling in a given month is billed *pro rata* at $8.75 per hour. For a minimum charge of $11.50 per month, customers may opt for a variation on this plan (Option B) that provides the same hourly calling as Option A plus an additional fifteen percent discount off interstate MTS calling in the evening rate period. For both Option A and Option B, a nonrecurring charge of $10.00 would be assessed when a customer orders a Block of Time plan. This charge would be waived during the first ninety days that the offering is available in a given local exchange area.

3. Tariff revisions setting forth AT&T's original Block of Time plan were filed with the Commission on April 13, 1984, bearing an effective date of June 7, 1984. In the *Block of Time Order*, the Common Carrier Bureau denied petitions seeking rejection or suspension of the plan, thereby allowing AT&T to begin offering its Block of Time plan in some parts of the country.[2] Those

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cations and Information Administration (NTIA) have filed consolidated oppositions to these applications. GCI's application for review is limited to the issue of whether AT&T should be allowed to offer its Block of Time plan for calls terminating in Alaska. GCI has also filed a petition to reject tariff revisions filed by Alascom, Inc. under Transmittal No. 263 that would implement a Block of Time optional calling plan for Alaskan customers making southbound MTS night/weekend calls. Because the issues raised by GCI in these pleadings are somewhat more complex than those associated with AT&T's offering of its Block of Time optional calling plan in the continental United States, we will consider GCI's application for review and petition to reject in a later order.

[2] The availability of Block of Time calling is contingent upon the completion of billing arrangements between AT&T and local exchange carriers. AT&T states that it expects to reach agreements with all exchange carriers by January 1985.

petitions set forth a number of arguments against AT&T's proposed offering. Primarily, the petitioners claimed that, if allowed to offer MTS service at $10.00 or $8.75 per hour, AT&T would be pricing MTS below cost. By dividing AT&T's $10.00 per hour charge by sixty minutes, petitioners developed a rate of 16.67 cents per minute of Block of Time calling. Because AT&T must obtain switched access service from local exchange carriers at a tariffed rate of approximately 17 cents per minute, petitioners argued that, even without considering AT&T's own costs of providing MTS, AT&T would necessarily suffer revenue losses with each minute of Block of Time calling.[3]

4. Petitioners argued that, because AT&T is a dominant carrier, it could compensate for these per minute losses by cross-subsidizing Block of Time calling with revenue gained from other, less competitive services. In their view, AT&T's proposal would be contrary to the Communications Act and would inhibit the development of competition in the market for long distance switched services. Other objections were that AT&T's plan created a contradictory rate structure for MTS calling, in that, on the one hand, AT&T's normal MTS rate schedule is both distance-sensitive and duration-sensitive (*i.e.* calls are priced according to distance, and initial minute rates are higher than subsequent minute rates). Block of Time calling, on the other hand, is "postalized." For the same flat monthly rate, a customer may make calls of any distance within the United States. In addition, the price for Block of Time calling will remain the same regardless of whether the hour of calling consists of a great number of brief calls or a few calls of long duration.

5. In dismissing petitions to reject or suspend AT&T's original Block of Time plan, the Common Carrier Bureau agreed that AT&T's per minute costs of providing MTS service (including the cost of obtaining switched access service from local exchange

[3] Presumably, some customers ordering Block of Time plans will not use the entire sixty minute initial period of calling every month. In these cases, AT&T's per minute revenues would be somewhat higher. At the subsequent hour price of $8.75, however, AT&T's per minute rate would be exactly 14.58 cents because subsequent hour calling is billed *pro rata*. Petitioners claimed that the lower subsequent hour rate would result in greater losses to AT&T. Petitioners also claimed that under typical contractual arrangements between AT&T and local exchange companies, AT&T will be required to pay in excess of $12.00 for each customer electing to use Block of Time billing. Yet, AT&T proposes to charge only $10.00 to its customers for starting the plan and, furthermore, would waive the charge for customers who elect Block of Time billing in the first 90 days that the plan is offered in a given exchange area. In their view, this aspect of the plan would also result in losses to AT&T.

carriers) would probably exceed per minute revenues from Block of Time calling. The *Block of Time Order* noted, however, that this was also true of part of AT&T's ordinary night/weekend rate schedule. In the Bureau's view, the disparity between AT&T's proposed Block of Time prices and AT&T's access costs was mainly attributable to the fact that, unlike AT&T's ordinary MTS rate schedule, access charges are not structured on a peak/off-peak basis. The Bureau's order indicated that this problem was essentially an anomaly in the current transition from the pre-divestiture environment to access charges. The *Block of Time Order* estimated that AT&T's price of $10.00 per hour for Block of Time calling appeared to approximate an average price for ordinary night/weekend MTS calling. The *Order* noted that time-of-day sensitive pricing structures were under consideration by the Commission in the Access Tariffs proceeding, CC Docket No. 83-1145, Phase I.[4] If peak/off-peak prices were to replace the current access charge structure, the *Order* stated that the disparity between AT&T's night/weekend prices and access costs would be likely to disappear. In these "limited circumstances," it appeared more reasonable to allow AT&T to develop its Block of Time plan, rather than require rejection for the sole reason that AT&T's access costs may exceed per-minute revenues.[5]

II. Discussion

6. The central argument presented by the various applications seeking review of the Bureau's *Block of Time Order* is that, by allowing AT&T to price its optional calling plan at $10.00 per initial hour and $8.75 per subsequent hour, the Bureau has erroneously allowed AT&T to price this MTS optional calling plan below cost. MCI and the Department of Justice have argued that this Commission has long adhered to the policy that the cost of providing service is "at the heart" of the Communication Act's requirement that rates be just, reasonable and non-discriminatory. *Private Line Rate Cases*, 34 FCC 244, 297 (1961). As the *Block of Time Order* acknowledged, AT&T's prices for its Block of Time plan are likely to be noncompensatory under current access tariffs. Therefore, according to the applications for review, the

[4] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-51 (released February 17, 1984).

[5] The Bureau's order dismissed other arguments raised against the Block of Time plan because they appeared to be premised on the assumption that the plan was priced below cost.

Block of Time plan should have been rejected.

7. On the other hand, it is clear that the problem of "below cost" pricing in interexchange carrier tariffs is not confined to AT&T's Block of Time offering. As the Bureau order pointed out, if the present access charge price structure were to be used as an inflexible benchmark for determining the reasonableness of AT&T's rates, many of AT&T's current MTS and WATS rates might be considered unlawful (for example, subsequent minute rates for ordinary night/weekend MTS calls do not exceed seventeen cents per minute until the calling distance exceeds 1910 miles). AT&T suggests that this problem can be resolved by either raising MTS rates or reducing access costs. Increases in rates, however, particularly in the night/weekend rate period, would only serve to curtail calling levels and reduce the economic gains attributable to peak/off-peak pricing structures. *See American Telephone & Telegraph Company* (WATS Phase I), 86 FCC 2d 820, 836 (1981) (*AT&T* (*WATS*)). Given the upheaval and customer confusion caused by the AT&T divestitive and implementation of a new access pricing system, we would not lightly require additional major changes in AT&T's pricing structure. We are especially hesitant to do so in these circumstances, where AT&T's "below cost" pricing appears to be due to changes in the regulatory environment.

8. Rejection of the Block of Time offering on the ground that it is priced below cost could also be read to conflict with prior Commission orders. For example, in 1981 the Commission ordered AT&T to price WATS on a time-of-day sensitive basis. This was before the SPF freeze relieved other-than-off-peak customers of the burden of "paying for" NTS costs assigned interstate by the stimulation of off-peak pricing. This combination of lower off-peak WATS rates, stimulated demand and increased SPF allocations placed additional NTS cost recovery burdens on daytime WATS customers—much as the "below cost" pricing of Block of Time is alleged to place increased burdens on daytime MTS users. The Commission more recently required AT&T to reduce both MTS and WATS rates by 6.1 percent across the board in conjunction with the implementation of access charges.

9. We believe that the Bureau was correct in permitting the tariff to take effect. The *Block of Time Order* found, and we agree, that AT&T's proposed prices for the initial hour of Block of Time calling approximated an average price for off-peak MTS calling under AT&T's currently effective MTS schedule. We note, in addition, that AT&T's currently effective night/weekend rates

were filed as a result of our prescription of a minimum "across-the-board" reduction in AT&T rates pursuant to Section 205 of the Communications Act, 47 U.S.C. § 205. *Investigation of Access and Divestiture Related Tariffs*, FCC 84-201 (released May 15, 1984). In these circumstances, we believe that the applications for review fail to show that AT&T's proposed prices are unreasonably low.[6]

10. We have examined other arguments presented by the applications for review and find them unpersuasive. For example, the applications for review filed by ALTEL, GTE Sprint, Lexitel and MCI claim that the Bureau failed to consider alleged "anticompetitive" effects of the plan. They argue that only AT&T will be able to sustain the per-minute revenue losses that they claim will occur as a result of Block of Time calling, and that AT&T will thus be able to force competitors out of the night/weekend segment of the long distance services market.

11. It is not clear, however, that AT&T's offering of the Block of Time plan will have any significant effect on other providers of switched message services. For example, to the extent that AT&T's prices for Block of Time calling represent an average of current night/weekend MTS prices, competitors would appear to be in approximately the same position as before the plan become effective. Moreover, under the current access charge rules, carriers offering MTS-type services, other than AT&T, may obtain switched access service at a flat monthly rate until the end offices at which these carriers originate or terminate traffic are converted to "equal access." *See* 47 C.F.R. § 69.206. Unlike AT&T, then, competing carriers paying flat monthly rates do not incur

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[6] The Department of Justice argues that the proper course would be to reject or suspend AT&T's offering of Block of Time service until such time that access charges are reduced. To do otherwise, according to DOJ, would be to give AT&T carte blanche in setting prices. We disagree. As noted above, AT&T's prices for the Block of Time plan appear to represent an average of its ordinary night/weekend MTS rates. Of course, we are not unconcerned about disparities between AT&T's MTS and WATS rates and its per minute costs. Moreover, to the extent that AT&T develops additional optional calling plans that are not readily comparable to its currently effective rate schedules, it may be difficult to judge the reasonableness of particular rates or rate structures, particularly where new plans consist of complex averages, flat rates or discounts off AT&T's currently effective rates. It appears, however, that AT&T's Block of Time filing presents only a limited perspective on the overall relationship between AT&T's MTS rates and its underlying access costs. Accordingly, we have instituted a separate investigation to aid our evaluation of future optional calling plan filings. *See* Guidelines for Dominant Carriers' Optional MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 84- (adopted November 21, 1984). We believe that this approach will allow us to thoroughly examine overall questions related to optional calling plans.

per-minute losses even if their off-peak rates are set below the per-minute premium access charges assessed to AT&T. Thus, AT&T's competitors are free to fashion appropriate competitive responses to these offerings.[7] Given this regulatory environment, it is unlikely that AT&T's Block of Time offering will force competitors out of the night/weekend segment of the long distance services market.

12. Applicants urging rejection of the Block of Time plan on grounds that it creates a contradictory rate structure within MTS argue that inclusion of the plan in AT&T's ordinary MTS schedule constitutes a discriminatory pricing practice in violation of section 202(a) of the Communications Act, 47 U.S.C. § 202(a). They also claim that the plan controverts the Commission's policies in favor of consistent rate schedules in tariffs. *See, e.g.*, Application for Review of GTE Sprint Communications Corp. at 13, *quoting Private Line Rate Structures and Volume Discount Practices*, CC Docket No. 79-246, FCC 84-147 (released April 24, 1984). At this juncture, we do not find that AT&T's offering of interstate night/weekend MTS on an hourly basis raises serious questions of unlawful discrimination between different classes of customers because it is a generally available rate which, according to AT&T, will be universally available as soon as feasible. We are aware of claims, however, that a proliferation of different optional calling plans in AT&T's MTS tariff could lead to customer confusion and thus be counterproductive. This does not appear to constitute a sufficient basis for rejection in the case of the Block of Time tariff. Accordingly, we will consider these issues in our overall investigation of AT&T's optional MTS pricing structures, *see supra* n. 6, but will not reject AT&T's Block of Time plan on this basis.

13. In the *Block of Time Order*, the Common Carrier Bureau independently examined AT&T's plan and found that it represented a simple, easy-to-understand billing arrangement that some customers might find useful. Moreover, the Bureau order noted that the results of AT&T's optional calling plan experiments showed that customers who purchase Block of Time optional calling plans tend to increase their off-peak usage levels, which in turn may increase network efficiency. In *AT&T(WATS), supra*, we determined that properly designed peak/off-peak pricing structures can increase network efficiency and more equitably allocate

[7] According to AT&T, other carriers obtaining equal access pay the same charges as does AT&T. Yet, AT&T claims that these carriers price some of their services below the cost of obtaining access.

costs among users. *Id.* at 842–47. In reaching this conclusion, we noted that use of time-of-day sensitive pricing had been successful in AT&T's MTS service, and was widely used in the switched message service offerings of other carriers, including MCI, Sprint, USTS, Western Electric, and numerous resellers. To the extent that AT&T's offering of off-peak MTS service under the Block of Time arrangement increases off-peak usage, it appears to us that the plan may result in overall benefit to the public. We therefore agree with the Bureau's conclusion that it does not seem unreasonable to allow AT&T to proceed with this optional billing arrangement.

14. Accordingly, IT IS ORDERED that the applications for review of *AT&T Communications, Inc.*, Mimeo No. 4711 (released June 6, 1984) ARE DENIED.

15. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Business Radio Service, Eligibility
Business Radio Service, Frequency
Frequency, Efficient Use of
Frequency, Loading
Rules, Exemption From

Memorandum Opinion and Order adopted affirming Private Radio Bureau's cancellation of 800 MHz trunked channels for failure to meet loading requirements of Rule 90.366(e). —*Business Radio Communications, Inc.*

FCC 85-596

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Application for Review of
Business Radio Communications Systems, Inc., licensee of 800 MHz SMR system WZF-975, Laurel, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 1985; Released: November 21, 1985

BY THE COMMISSION:

1. The Commission has for consideration Business Radio Communications, Inc.'s (BRC) March 22, 1985, Application for Review. BRC seeks review of the Private Radio Bureau's March 11, 1985 denial of its Petition for Reconsideration of the Bureau's December 14, 1984, determination which reclaimed, at the time of license renewal, 7 of BRC's 10 authorized channels from Specialized Mobile Radio (SMR) system WZF-975. The channels were taken back for reassignment to waiting list applicants in the Washington, D.C. area as a result of BRC's failure to meet the minimum

loading requirement of Rule 90.366(e).

2. BRC was granted a license for 10 channel SMR system WZF-975 on November 14, 1979, for a five year term. Rule 90.366(e) states that if at the end of the five year license term such a system is not loaded to 70 percent capacity (700 mobile and control units) and all trunked channels are assigned in the system's geographic area, authorization for channels not loaded to 100 units cancels automatically. Thus the loading deadline imposed by Rule 90.366(e) was November 14, 1984. On December 14, 1984, the Bureau determined that its licensing records indicated that 273.5 units (236.5 mobiles and 37 controls) were operating on WZF-975 as of the November 14 loading date. Based upon the Commission's policy of rounding up to 100 units per channel, it was determined that BRC was entitled to retain 3 channels.

THE BUREAU'S DENIAL OF BRC'S PETITION FOR RECONSIDERATION

3. BRC's Petition for Reconsideration was denied by the Bureau on March 11, 1985. The Bureau noted that BRC did not question the Bureau's finding of 273.5 authorized units on WZF-975 as of the pertinent loading date and that BRC had therefore failed to meet the express loading conditions of its authorization. In denying BRC's reconsideration request the Bureau concluded that BRC's assertions that its failure to load resulted from depressed economic conditions and a zoning challenge to its transmitter tower by an adjoining landowner did not provide a basis for waiver of the loading provisions of Rule 90.366(e). Citing our decisions in *AAT Electronics Corporation*, 93 FCC 2d 1034 (1983) and *P & R Temmer*, 93 FCC 2d 1051 (1983), both *aff'd sub nom. P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984), the Bureau stated that we have consistently held that the Commission cannot insure an SMR entrepreneur against business losses incurred as a result of independent business judgments to the detriment of other entrepreneurs who are waiting for this limited spectrum. Finally, the Bureau determined that there was no merit to BRC's claim that it was unlikely that the channels recovered from BRC could be reassigned in the Washington, D.C. — Baltimore area because of the 70 mile co-channel spacing requirement. In fact, the Bureau noted that the first and second applicants on the Washington, D.C. waiting list

could be assigned the channels recovered from BRC.

BRC's APPLICATION FOR REVIEW

4. In its Application for Review BRC argues that recovery of 7 of its channels would neither serve the public interest nor accord with procedural fairness. BRC requests that we revise the Bureau's recovery action and grant a reasonable extension of time within which BRC can achieve the required loading for at least 5 of its 10 channels. BRC's request is based on its good faith efforts to load its system despite an adverse economic situation and a zoning challenge which it claims were beyond its control. BRC emphasizes that its sale efforts resulted in a 200 percent increase in loading during the last two years of its license term when economic conditions had improved.

DISCUSSION

5. We have consistently held that the consequences of independent business decisions did not release a licensee from the loading requirements. In *AAT* and *Temmer*, *supra*, the court affirmed our conclusion that equipment problems associated with the licensee's choice of equipment manufacturer and the licensee's selection of a transmitter location which was unpopular did not absolve the licensee from the loading responsibilities imposed by the rules. Similarly, in *Texas Two-Way, Inc.*, FCC 84-376 (Released August 7, 1984), *aff'd sub nom. Texas Two-Way, Inc. v. FCC*, Nos. 84-1171, 84-1397 (D.C. Cir. 1985), citing *AAT* at 1046 and *Temmer* at 1060, we determined that interference resulting from the subsequent construction of a building was a consequence of the licensee's independent business judgment in choosing a transmitter site and did not relieve the licensee from its obligations under the rules.

6. BRC seeks to distinguish itself from the above cases by asserting that the zoning challenge by an adjoining landowner, which reportedly impeded its loading efforts, was a circumstance beyond its control.[1] We disagree. By their very nature, adverse effects resulting from business decisions are unforeseen. However, as we stated in *P & R Temmer*, *supra.* at para. 33, the location of a transmitter is not a circumstance beyond the licensee's control. The zoning challenge was a problem related to BRC's selection of

[1] There is no evidence that the zoning challenge caused a significant delay in the construction of WZF-975. The station was apparently constructed within one year as required by Rule 90.366(d).

a transmitter site which was an independent business decision. BRC's failure to meet the loading requirements as a result of the consequences of its business decision does not provide an adequate basis for waiving the loading requirements to the detriment of the 32 Washington, D.C. area waiting list applicants for this limited 800 MHz spectrum. Some of these applicants have been on the waiting list for three years.

7. BRC's assertion of its good faith efforts to load its system does not warrant an extension of the loading deadline so that it can retain at least 5 of its 10 channels. The five year loading period provides a licensee with the opportunity to overcome impediments to loading. We have consistently sought to make certain that the 800 MHz channels authorized to SMR licensees were put in use or assigned to others if express loading requirements were not met. *Memorandum Opinion and Order*, Docket 18262, 51 FCC 2d 945, 983 (1975) and *Second Report and Order*, Docket 79-191, 90 FCC 2d 1281 (1982). We allow the marketplace to establish which licensees are utilizing channels to the prescribed minimum levels. Those who load their channels are allowed to retain them. As stated above, those who do not must return them for reassignment to waiting list applicants who have waited years for the opportunity to utilize the reassigned channels.

8. Finally, we reject BRC's claim that the prior economic circumstances provide a basis for extending its loading date beyond November 4, 1984. The general condition of the economy is a factor common to all SMR licensees and is not a unique circumstance which justifies a waiver of the loading requirements. Moreover, the five year loading period provides a sufficient opportunity to load despite periods of economic weakness. Therefore, BRC's request for a waiver of the loading requirements of Rule 90.366(e) is denied.

9. Accordingly, BRC's Application for Review is denied. The 7 channels reclaimed from WZF-975 should be routinely reassigned by the Bureau.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appeal, Procedural Requirements
Application, Dismissal With Prejudice
Interlocutory Ruling Appeal From
Notice of Designation Local

Review Board reinstated application that was dismissed by ALJ for failure to publish notice of the designation of the application for hearing. Board also indicated that appellant erroneously invoked Section 1.302 in prosecuting its appeal and that Section 1.301 was the proper vehicle since the dismissal of appellant's application did not terminate the proceeding.
—*Coast TV*
MM Docket No. 84-934

FCC 85R-89

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Coast TV	MM Docket No. 84-934 File No. BPCT-840720KG
Mission Broadcasting Corporation	MM Docket No. 84-935 File No. BPCT-840723KI
Solar Television, Inc.	MM Docket No. 84-936 File No. BPCT-840723KJ
For Construction Permit Santa Barbara, California	

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1985; Released: November 4, 1985.

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed July 26, 1985 by Coast TV (Coast) from a Memorandum Opinion and Order released July 18, 1985 (FCC 85M-2837) by presiding Administrative Law Judge (ALJ) Edward Luton dismissing its application for failure to publish notice of the designation of the application for hearing as mandated by Section 311(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 311(a), and Section 73.3594, 47 CFR § 73.3594 of the Commission's Rules.[1] The application was dismissed after Coast had already participated in a nine-day comparative hearing. The ALJ concluded that the Section 311(a)(2) defect rendered the hearing a nullity insofar as Coast's application was concerned, thereby stripping him of jurisdiction over Coast's application. FCC 85M-2837, *supra*, paras. 3, 5. Consequently, stating that he was powerless to act, the ALJ also denied a petition for special relief filed by Coast requesting that he set a new hearing date for its application, authorize Coast to publish notice thereof, and permit Coast to offer into evidence the entire record as originally compiled, subject to whatever conditions are necessary to avoid prejudice to other parties. The ALJ recognized that the relief requested by Coast had previously been granted in *Martin R. Karig*, 45 FCC 625 (1963), but he considered the facts there distinguishable from those involved in the instant case. Coast argues on appeal that the ALJ had jurisdiction to consider its petition for special relief and that its petition should have been granted. Oppositions were filed by the competing applicants, Mission Broadcasting Corporation (Mission) and Solar Television, Inc. (Solar), and Coast has replied. The ALJ stayed the proceeding pending the Board's disposition of Coast's appeal. *See* Order, FCC 85M-3441, released September 4, 1985.

2. The Review Board will grant the appeal and reinstate Coast's application.[2] The Commission has recognized that it cannot waive the statutory local notice requirements promulgated

[1] Section 311(a) of the Act provides in pertinent part that when a broadcast application has been formally designated for hearing the applicant must give notice of the hearing the applicant must give notice of the hearing at least ten days before its commencement. Section 73.3594 of the Rules, which prescribes the form, content, manner, and frequency of the notice provides that the "[n]otice shall be given at least twice a week, for two consecutive weeks within the 3-week period immediately following release of the FCC's order, specifying the time and place of the commencement of the hearing, in a daily newspaper of general circulation published in the community in which the station is located or proposed to be located.

[2] A pleading filed by Coast on September 10, 1985, styled "Request for Waiver of Rule 1.301(b)," in which Coast seeks permission to appeal portions of the ALJ's September 4 stay order, will be dismissed as moot.

in Section 311(a)(2) of the Communications Act, and, therefore, any hearing already completed is a nullity insofar as it concerns the application of a party not complying with the statute. *See Martin R. Karig, supra*; *Reliable Broadcasting Co.*, 25 RR 93 (Rev. Bd. 1963). Moreover, under certain conditions, noncompliance with the statute may result in the dismissal of an application. *See Reliable Broadcasting Co., supra.* Generally, however, the Commission and its administrative law judges have been lenient both in granting waivers of Section 73.3594 to applicants like Coast who have failed to comply with the local notice requirements due to neglect or mistake (*see Star Stations of Indiana, Inc.*, 3 FCC 2d 961, 963, 8 RR 2d 393, 396 (Rev. Bd. 1966)), and in continuing proceedings to enable applicants to comply with the statute (*see Reginaldo Espinoza II*, FCC 82M-2021, released June 28, 1982 (ALJ); *cf. Margaret Ann Cole & Robert Everett Cole*, FCC 85M-3899, released October 7, 1985 (ALJ)). And, in *Martin R. Karig, supra*, the Commission nullified a hearing that was essentially complete and afforded an applicant who had neglected to publish notice due to mistake an opportunity to comply with the statute.

3. In the instant proceeding, the ALJ, relying on *Reliable Broadcasting Co.*, 24 RR 486 (ALJ 1962), *aff'd*, 25 RR 93, *supra* concluded that he lacked jurisdiction to grant the relief requested by Coast to cure its defective publication. To the extent that the ALJ's ruling before us was based on lack of jurisdiction, we agree with Coast that this rationale is erroneous. *Reliable Broadcasting Co., supra*, merely reflects that a presiding ALJ has discretionary authority, when good cause is lacking, to deny a continuance of a hearing that would enable an applicant to bring itself into statutory compliance. Nowhere does that case address the question of jurisdiction to consider the procedural steps necessary to cure a statutorily defective publication. In any event, except for that case, where additional adverse factors were present,[3] the parties here have not cited a single instance where an application was dismissed for failure to meet the publication requirements due to inadvertence or mistake. On the contrary, Coast cites *Martin R. Karig, supra*, where, as noted in para. 2, *supra*, the Commission afforded an applicant the opportunity to cure its statutorily defective publication even though the proceeding was

[3] The applicant in *Reliable* had failed to comply, or give a reason for its failure to comply, with an order of the presiding officer setting a date for the exchange of engineering exhibits. The applicant did not have any substantial excuse for not meeting the exchange date or for not publishing the notice of hearing.

essentially complete. Insofar as the ALJ distinguished *Karig* and rejected Coast's reliance on it, we are not persuaded that the differences in the two proceedings are significant enough to prevent the *Karig* procedure from being employed here. The ALJ had noted that the "unorthodox procedure [in *Karig*] . . . was successfully employed by the Commission . . . because no party opposed its use and because petitioner's application was not mutually exclusive with any other application." FCC 85-2837, *supra*, at para. 5. While these factors may not have been present in *Karig*, nevertheless, the potential difficulties with this approach raised by Mission and Solar (*i.e.*, setting a precedent to benefit future careless applicants; potential new parties seeking intervention; additional costs to the competing applicants) were equally possible in *Karig* since there were other parties involved there, too.[4]

4. The final objection to the appeal raised by Mission and Solar (*i.e.*, that Coast failed to seek a continuance and instead kept silent about its known dereliction throughout the nine-day hearing) is overstated, and the applicant's conduct not sufficient to justify denying it an opportunity to correct its publication defect. In an affidavit attached to Coast's reply, Martha Correa, one of Coast's general partners, explains that she initially learned that the applicant had a possible local notice deficiency on the morning of the first hearing session (March 12, 1985) but because she could not recall whether the publication previously made by the applicant of notice of the filing of the application also indicated notice of the hearing, she telephoned Santa Barbara at the end of the day's session, requesting that an investigation be made as to whether the publication included both notices. She was told on the following day that the investigation was not completed. Finally, at the end of the hearing session on March 14, she was informed that Coast indeed had a publication problem. Ms. Correa then executed her affidavit to that effect which was thereupon appended to Coast's opposition to Mission's motion to dismiss and to Coast's petiton for special relief, both filed on March 19, 1985. Coast points out that by the end of the day on March 14, hearing involving its application was concluded — the remaining six and one-half days of hearing were devoted to the

[4] Moreover, we are not persuaded that these potential difficulties would justify dismissal of Coast's application; that is, the participation of new intervening parties is speculative and, if it does occur, can be adequately handled by the ALJ in the first instance to ensure that the rights of interested persons are not prejudiced. Additional costs and delay will not be avoided in any event because already-specified hearing issues remain to be tried against one other applicant.

other applications — and argues that it would have served no necessary purpose to expedite this information to the ALJ. Although we disagree with Coast on this latter point and believe that immediate notification to the ALJ was preferable, and perhaps might even have prevented some of the confusion which later ensued, we do not find this lapse on its part sufficient to warrant dismissal of Coast's application. The damage of having the early hearing sessions nullified was already done, and corrective steps to rectify the problem were necessary even in the absence of additional delay.

5. In sum, the Board will grant Coast authority to seek a new time and place of hearing from the presiding ALJ and to effect thereafter the publication specified by Section 73.3594 of the Rules. The sufficiency of the notice should in the first instance be determined by the ALJ.[5] We will also authorize the ALJ to admit by proper motion any previously submitted testimony, subject to the condition that the rights of any interested persons not be prejudiced thereby.

6. There is one additional matter that has created some confusion among the parties, not only at hearing, but also in the pleadings filed before the Board. It concerns the type of appeal before us. Coast invoked Section 1.302 of the Rules in prosecuting its appeal. We believe that choice, however, was erroneous. That section pertains to appeals from a presiding officer's final ruling and specifically reads: "*[I]f the presiding officer's ruling terminates a hearing proceeding*, any party to the proceeding, as a matter of right, may file an appeal from that ruling within 30 days after the ruling is released." Section 1.302(a) (emphasis added). If an appeal is filed under that section, the effect of the ruling appealed is stayed pending the completion of the proceeding on appeal or review. Section 1.302(b). On the other hand, Section 1.301, which governs appeals from a presiding officer's interlocutory ruling, specifically reads: "(a) Interlocutory rulings which are appealable as a matter of right . . .

> (1) If the presiding officer's ruling denies or terminates the right of any person to participate as a party to a hearing proceeding, such person, as a matter of right, may file an appeal from that ruling." Section 1.301(a)(1).

Appeals pursued under Section 1.301(a) do not automatically stay

[5] The other applicants in this proceeding need not republish their notices. As to them, the Board regards the hearing as already commenced within the meaning of Section 311(a)(2) of the Act. *See Martin R. Karig*, supra.

the effectiveness of the ALJ's ruling. *See* Section 1.301(c)(1). It is apparent from the wording of the rules and the language of the Report and Order promulgating these provisions[6] that the Commission contemplated that appeals such as the instant appeal were to be prosecuted under Section 1.301(a). Consequently, Coast's position that it is entitled to continued full party status after its dismissal is erroneous,[7] and its request for waiver of Section 1.301(b) to file an appeal from the ALJ's September 4 stay order, see n. 2, *supra*, is moot since Coast could not in any event appeal the stay order because it was not a party when the stay order was issued. *See Denton FM Radio, Ltd.*, 58 RR 265 (Rev. Bd. 1985); *East Hampton Broadcasting Co., Inc.*, FCC 84R-65, released September 20, 1984. Nevertheless, because all of the applicants have participated in this appeal as though Section 1.302 was the proper vehicle for such an appeal, and no parties have therefore been prejudiced, the Board has considered all of the pleadings before it even though they have considerably exceeded the page limitations imposed by Section 1.301 and have included an unauthorized reply by Coast.

7. ACCORDINGLY, IT IS ORDERED, That the Appeal From Dismissal of Application filed July 26, 1985 by Coast TV IS GRANTED to the extent indicated herein; and

8. IT IS FURTHER ORDERED, That the "Request for Waiver of Rule 1.302(g)," filed August 28, 1985, by Coast TV and its request for leave to file unauthorized pleading, filed September 10, 1985 ARE DENIED; and that its "Request for Waiver of Rule 1.301(b)," filed September 10, 1985 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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[6] "Section 1.301(a) provides for appeal ... from a ruling which denies or terminates the right of any person to participate as a party to the proceeding (*e.g.*, an order dismissing an application or denying a petition to intervene) ..." *Hearing Proceedings-Presiding Officer Authority*, 26 FCC 2d 331, 332 (1970).

[7] *But cf. A. C. Elliott, Jr.*, 41 RR 2d 1267, 1270 n. 3 (1977), cited by Coast where the Commission indicated that an applicant had 30 days under Section 1.302 to appeal its dismissal even though the ALJ's ruling apparently did not terminate the proceeding, without attempting to reconcile this approach with the clear language of its rules or *Hearing Proceeding*, *supra* n. 6 at 333 (Section 1.302 "deal[s] with rulings of the presiding officer which ... leave nothing further to decide"). This precedent has not been followed in subsequent cases and, indeed, in a number of instances the Commission has affirmed similar appeals taken under Section 1.301 without indicating that anything was amiss. *See, e.g.*, *Faith Center, Inc.*, 92 FCC 2d 1257, 1260, 52 RR 2d 1547, 1550 (Rev. Bd. 1983), *rev. denied*, FCC 83-530, released November 18, 1983 (Comm'n).

Allocation, Frequency
Public Safety Radio Service, Operation
Satellite, Direct Broadcast
Special Relief
Terrestrial Service

Public safety terrestrial fixed service operator facing frequency relocation to accommodate Direct Broadcast Satellite (DBS) operations petitions for special relief in the form of mandatory reimbursement from DBS permittees or an extension of the date by which it must operate on a strict non-interference basis with DBS operators. Extension granted due to the critical nature of the public safety services at stake and the threat to those operations that a more timely relocation would present.
—*County of Los Angeles*

Allocation, Frequency
Satellite, Direct Broadcast
Special Relief
Terrestrial Service

Terrestrial fixed service operator facing frequency relocation to accommodate Direct Broadcast Satellite (DBS) operations petitions for an extension of the date by which it must operate on a strict non-interference basis with DBS operators. Relief denied, as determination had been previously made that the public interest favored introduction of the DBS services, despite costs of relocation for existing users of the frequencies, and no change in circumstances warranting reevaluation of that determination was presented.
—*County of Los Angeles*

FCC 85-621

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re:	
County of Los Angeles Los Angeles, California;	Petition for Special Relief
Aerospace and Flight Test Radio Coordinating Council	Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 1985; Released: November 27, 1985

BY THE COMMISSION:

1. The County of Los Angeles, California (hereinafter "L.A. County" or "County") filed the subject petition for special relief on February 15, 1984 (File No. DBS-SR-1). The County has also responded by letter of June 17, 1985, to specific questions directed to it by the Chief, Mass Media Bureau by letter of April 26, 1985, regarding certain information in support of its petition. Oppositions to and comments on the petition and/or the County's responsive letter have been filed by Direct Broadcast Satellite Corporation (DBSC); Western Union Telegraph Company (Western Union); United States Satellite Broadcasting Company, Inc. (USSB); CBS, Inc. (CBS); Satellite Television Corporation (STC); and Hughes Communications Galaxy, Inc. (Hughes).[1] The Aerospace and Flight Test Radio Coordinating Council (AFTRCC) filed a petition for relief on February 22, 1985. That petition was dismissed by the Chief Scientist on March 7, 1985, and AFTRCC filed the subject application for review on April 8, 1985. AFTRCC's application for review is supported by Aerospace Industries Association of America, Inc. (Aerospace), Association of American Railroads (Railroads), Harris Corporation (Harris), American Newspaper Publishers Association (Newspapers), and International Communications Association. AFTRCC's application for review is opposed by Direct Broadcast Satellite Association, STC and USSB.

2. The petitions seek relief from the Commission's rules adopted in *Report and Order* in General Docket 80-603 ("*DBS Order*"), 90 FCC 2d 676 (1982), dedicating the 12.2-12.7 GHz band to the Direct Broadcast Satellite (DBS) Service. In that Order, the Commission required terrestrial fixed service (FS) users in that band to relocate to other spectrum by September 1988 or assume a secondary user status at that time, including strict noninterference to DBS systems. L.A. County now seeks to have DBS operators reimburse it for expenses that would be incurred in relocating its existing microwave communications facilities to other spectrum. In the alternative, it requests that the Commission extend for five years the period during which it would maintain its status as a primary user in the 12.2-12.7 GHz band

[1] All opponents are, or were at the time their pleadings were filed, DBS permittees.

(until September 1993), issue permits for replacement channels promptly, and extend to September 1993, the date by which it must commence operations pursuant to the issuance of the permits.[2] AFTRCC also sought a five-year extension of the transition period of all FS users in the 12.2–12.7 GHz band, and requested that the Commission reconsider its exclusive dedication of that entire spectrum to DBS.[3] That petition was dismissed by the Commission's Chief Scientist, and AFTRCC here contends that the Chief Scientist's dismissal of its petition was arbitrary and capricious, and beyond the scope of his delegated authority.

Background

3. The World Administrative Radio Conference of 1979 ("WARC-79") modified the International Allocations Table to reallocate a portion of the 12 GHz band to include Broadcasting Satellite Service for downlink transmission, and placed restrictions on existing and future terrestrial services in that band. See International Radio Regulations, Radio Regulations Nos. 3787D, 3787E (1982 Edition). For several years prior to that time, the Commission had begun advising each operational-fixed user issued a license in the 12.1–12.7 GHz band to the effect that the licensee might be required to adjust its operations to accommodate DBS service. The Commission initiated domestic proceedings to establish definite DBS policies in 1980[4] which included consideration of the potential conflict between FS and DBS users in the 12 GHz band. In the ensuing *DBS Order*, *supra*, the Commission authorized the new DBS service and set out preliminary parameters governing the accommodations which FS users would be required to make, including protection of DBS operators from all interference. Reimbursement of relocation costs to displaced FS users was not generally contemplated, but to mitigate relocation costs, the *DBS Order* allowed FS users to remain on the 12.2–12.7 GHz band until September 9, 1988, on a primary basis and, thereafter,

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[2] Section 94.51 of the Commission's Rules provides that stations authorized in the 12.2–12.7 GHz band on or before September 9, 1983, will have 36 months from the grant of authorizations for replacement channels to place the stations in operation. 47 C.F.R. §§ 94.51, 94.93.

[3] AFTRCC and Aerospace use the subject spectrum primarily in connection with flight testing, telemetry, and data transmission. Newspapers have 12 GHz microwave links for newsprint transmission to suburban printing plants. Railroads use microwave systems for audio and video communications.

[4] *Notice of Inquiry*, 45 Fed. Reg. 72719 (published November 3, 1980); *Notice of Proposed Policy Statement and Rulemaking* in Gen. Docket No. 80-603 ("*DBS Notice*"), 86 FCC 2d 719 (1981).

on a secondary basis.

4. L.A. County filed a petition for reconsideration of the *DBS Order* alleging that the Commission (1) failed to give adequate consideration to the needs of FS users of the band, (2) failed to afford fixed services adequate alternative accommodations, and (3) failed to establish adequate procedures to compensate FS users that would be required to move. Although the Commission determined that the petition for reconsideration was procedurally defective, the merits were nevertheless discussed and disposed of in *Memorandum Opinion and Order* in Gen. Docket No. 80-603 ("*DBS Reconsideration*"), 94 FCC 2d 741 (1983).[5] There, the Commission reiterated its findings in the *DBS Order*, *supra*, that the 12 GHz band was the only spectrum that was compatible with both international and domestic DBS allocation plans. The Commission confirmed its determination that commencement of DBS service in the foreseeable future and provision of sufficient spectrum for its growth and development should be given a high priority. It pointed to several means by which the FS users were protected, including a rulemaking proceeding which the Commission had accelerated not only to make a sufficient amount of spectrum available, but to find the most desirable bands; *i.e.*, bands adjacent to or lower than 12 GHz. (See paragraph 5, *infra*.) In the context of reconsideration, the Commission explicitly acknowledged its obligation to address and rectify any cases involving "severe hardship or potential risk to the public safety." *DBS Reconsideration*, *supra* at 751. It indicated that it was empowered to fashion a wide range of relief which could include extending the transition date for a limited period or requiring DBS operators either to accept interference or provide appropriate compensation to the displaced public safety user upon receiving a properly documented request.

5. Thereafter, the Commission adopted the *First Report and Order* in Gen. Docket 82-334, 48 Fed. Reg. 50722 (November 3, 1983), 54 RR 2d 1001, where, among other things, it identified the 18, 13 and 6 GHz bands for relocation of FS users, extended the construction period to three years for FS users displaced by DBS, and granted them priority in receiving authorizations. It also indicated that relocation to other portions of the spectrum would

[5] The Commission concluded that the petition failed to meet the basic requirements of a petition for reconsideration because the substantive allegations of Commission error were not supported by appropriate facts and the petition included a request for relief not properly filed in a petition for reconsideration. *DBS Reconsideration*, *supra* at 747.

be considered, where appropriate. The Commission concluded that these steps, along with those in the *DBS Order* were sufficient to eliminate the need for nonvoluntary compensation by DBS operators. Petitions for reconsideration of this decision were rejected in *Memorandum Opinion and Order* in Gen. Docket 82-334, 49 Fed. Reg. 37760 (September 26, 1984).

6. L.A. County and AFTRCC (and others) appealed the *DBS Order* to the U.S. Court of Appeals. In *NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984), the Court affirmed the Commission's authority to reallocate the band from FS use to DBS use and to do so without compensation for existing users, but stressed that the needs of FS users that utilize the band for vital public safety services must be accommodated.

L.A. County's Petition for Special Relief

7. L.A. County's petition for special relief stems from the fact that it will be compelled to move out of the 12 GHz band to avoid interference to DBS operations in the Los Angeles area. L.A. County claims that the Commission's action will harm vital "public safety" services because "even under the best of circumstances, it cannot comply with the Commission's relocation policies without adversely affecting its ability to meet the public safety requirements of the people of Los Angeles County," based on its technical and economic analysis of the alternatives. (Petition at 5.) It contends that the general relief provided for displaced FS users is inadequate for it, and that various legislative mandates, Commission precedent, and the Commission's own representations to the Court in the DBS proceeding require that it be granted the special relief it seeks.

8. According to L.A. County, it presently has a microwave communications network covering 760 miles that interconnects hundreds of base and mobile relay stations that it uses primarily for fire, police and paramedic services. The microwave network is said to be necessary to serve areas that are not suitable for ordinary telephone lines and, due to the nature of the safety services involved, each link of the network must be available for use 99.9995 per cent of the year.[6] Currently, two thirds of the County's system (29 two-way links) are in the 12.2-12.7 GHz

[6] The characteristics of the County requiring a highly reliable communications network are described in considerable detail. Some of the characteristics include a land area of approximately 4,100 square miles, the largest population of any U.S. county, an unusually diverse terrain and frequent natural disasters of all kinds.

band.[7] It states that its equipment is normally considered for replacement after 18 years, although it sometimes remains effective for longer periods. Specifically, it states that of its 58 links in the 12.2 to 12.7 GHz band, 40 links would not normally be considered for replacement until 1993 and 18 would not be considered until 1997. Consequently, if forced to relocate by 1988, it would forego at least five to nine years of the normal useful lives of its microwave operations, as well as incur expenses earlier than planned.

9. The County estimates that it could incur costs ranging from 2.81 to 3.27 million dollars, excluding engineering and legal fees, as well as costs resulting from service disruption in relocating to the adjacent band by the September 9, 1988 deadline.[8] It contends that the only way it could meet such financial pressures would be to make cuts in existing services where it has not been enjoined or prohibited by state law from so doing.[9] It cannot forego current profits or borrow capital with the expectation of generating future income like its commercial counterparts. Less than 1.5 per cent of L.A. County's budget is available for discretionary uses. Although its annual budget is $5.5 billion, L.A. County states that $4 billion is for purposes over which it has no control. According to L.A. County, the funds for public safety, health, welfare and other government services come from the remaining $1.5 billion, much of it used to acquire matching state and federal grants. It insists that funds to relocate the communications system must come directly from the budgets of

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[7] L.A. County originally stated that 90% of the use of its system was for police, fire and paramedical purposes. In response to the Bureau's letter, it further broke down its current usage of the subject links at 58.5% by sheriff and fire departments, 9.3% by the Department of Communications, and 25.7% by other departments involved in public safety. It could not provide data on the relative emergency versus nonemergency use of individual links in its system, and asserts that any nonemergency use does not reduce the merits of its claim regarding its need for full capacity for emergency services, and that each individual link has such emergency use.

[8] The County originally estimated a cost of 2.55–2.96 million dollars for relocating in an adjacent band, derived by totalling the equipment and labor costs for retuning and/or replacing its 12 GHz radios and antennas at the time of the petition. (This presumes relocation to that portion of the 12 GHz band not allocated for DBS or to the adjacent 13 GHz band.) Its more recent figures are in its response letter at p. 42.

[9] Article XIII of the California Constitution (Proposition 13) provides a variety of broad limitations on the County's spending and taxing abilities. It essentially limits appropriations to those continued from the preceding fiscal year, and Article XVI precludes long-term borrowing. In addition to a one per cent maximum ad valorem tax on real property, it states that any other ad valorem property tax is prohibited "even with voter approval."

those departments and agencies that use the system. Due to these budgeting problems, it states that it has been forced to curtail services every year since Proposition 13 was adopted in 1978 and lists a number of services which were eliminated during fiscal years 1982, 1983, and 1984.[10] L.A. County maintains that its only recourse would be to reduce its work force further and curtail and/or eliminate many essential services; *e.g.*, to close ten fire stations or reduce police patrol services by five per cent.

10. Consequently, L.A. County requests reimbursement from DBS operators, whether from all operators or those serving the County of Los Angeles prior to September 9, 1993, or to be allowed to operate its FS system in the 12.2–12.7 GHz band without protection to DBS systems until September 9, 1993; and that it be permitted to secure alternate spectrum now without commencing operations until September 9, 1993. (See fn. 2, *supra.*) It asserts that it is obliged to seek relief now, since it has already determined that it will not be able to absorb the costs for relocating in 1988, even given the least expensive alternative, without curtailing vital safety services. Also, it claims it would need three years lead time from the filing of the applications for replacement channels to the commencement of operations. It fears that waiting until a later date would prejudice its ability to get satisfactory relief because, *inter alia*, the preferred channels are likely to have been taken by other FS operators.

11. The relief requested, according to L.A. County, would be consistent with Commission decisions reflecting a long-standing policy of mandatory compensation in similar situations.[11] It further asserts that Sections 1 and 332 of the Communications Act of 1934, as amended, (47 U.S.C. §§ 151, 332) require the Commission to manage the spectrum to promote the safety of life and property. This mandate is reinforced, it contends, by the more recent legislative enactments in the Communications

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[10] For example, according to L.A. County, in FY 1982 it reduced County employees by approximately 3,600 positions and closed six community health centers, four probation offices, six welfare offices and three district attorney offices; in FY 1983 it reduced County employees by approximately 3,500, withdrew from Social Security and made cuts in other governmental services; and in FY 1984 the County workforce was reduced by approximately 1,600 positions, with additional cuts in government services, and the County had to borrow from the County's employee retirement fund. L.A. County Reply at 36–39.

[11] L.A. County cites *Sudbrink Broadcasting of Georgia, Inc.*, 65 FCC 2d 691 (1977); *Athens Broadcasting Co., Inc.*, 68 FCC 2d 920 (1979); *Harold A. Jahnke*, 74 FCC 2d 265 (1979); *Broadcast Corporation of Georgia*, 96 FCC 2d 916 (1983); and *FM Table of Assignments*, 8 FCC 2d 159 (1967).

Amendments Act of 1982[12] and Section 9 of the Federal Communications Commission Authorization Act of 1983.[13] L.A. County contends that these provisions require that public safety users be compensated or receive other relief to guarantee their continued viability. L.A. County also points out that the Commission conditioned authorizations granted to DBS permittees on whatever later rules might be deemed necessary, appropriate or otherwise in the public interest.[14]

12. L.A. County insists that it has made the necessary showing in its pleadings to demonstrate that special relief is warranted. Although it concedes that the cost projections may not be precise, it nonetheless argues that it has framed its request for relief narrowly and that the cost estimates do show that special relief is needed even if the specific amount that would be assessable to DBS operators is not yet known.

AFTRCC's Petition

13. AFTRCC contends that the Commission's staff exceeded its authority in acting on its petition for relief. It concedes that the Chief Scientist has authority to dismiss petitions for rulemaking, but contends that the characterization of AFTRCC's petition as a rulemaking request was erroneous. It further argues that the dismissal letter disregards the fact that the Commission has expressly committed itself, in AFTRCC's opinion, to consider petitions for relief with respect to its DBS transition policies. It further insists that the Commission's stated commitment to mitigate any dislocation as much as possible was a significant reason for the Court's affirmance of the DBS decision in *NAB v. FCC, supra.*

14. AFTRCC also argues that dismissal of its petition was substantively improper. It contends that its request was not "premature," as stated by the Chief Scientist, as "a number of the parties which had been in the forefront of DBS have either abandoned or drastically curtailed their plans."[15] (Application at

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[12] 47 U.S.C. § 332(a) (Supp. 1983).

[13] Pub. L. No. 98-214, 97 Stat. 1467 (1983).

[14] In *Satellite Television Corporation*, 91 FCC 2d 953, 954 n. 4, 986 (1982), the Commission, recognizing the interim nature of the early DBS authorizations, indicated that the initial development of the DBS services should be in an open, flexible regulatory environment. It determined that more restrictive regulation could be established as the need arose. *See also, CBS, Inc., et al.*, 92 FCC 2d 64, 66, 76, 86, 116 (1982).

[15] Aerospace and Railroads similarly contend that DBS was founded on expectations that are no longer being realized. It points out that no DBS system is

9.) It continues that FS operators must commence planning and budgeting for new systems now in order to meet the current deadline for relocating. It now characterizes its original petition as "chiefly" seeking an extension of the transition period, while merely "suggesting" that the Commission "might wish" to reconsider its DBS allocation. Harris claims that the relocation spectrum is already crowded, making relocation difficult. Railroads complain of the adverse effects on current users of the relocation bands which would be caused by further crowding of those bands by relocating 12 GHz users. AFTRCC and its supporting parties claim that a five-year extension will provide more time to observe the development of DBS before making expenditures which may ultimately prove to be unnecessary. Harris goes even further to suggest that the Commission now reassign half of the DBS spectrum to its current FS use until it is evident that DBS will succeed.

Oppositions to L.A. County

15. Some of the parties opposing the grant of special relief to L.A. County do not challenge L.A. County's contention that it warrants special consideration, but all contend that the request for relief is premature and/or that L.A. County has failed to show that compliance is technically impossible or to otherwise document that safety services would be unavoidably threatened. They contend that special relief at this time would be premature because there are numerous variables that would affect the propriety of any relief by September 1988. Generally, they contend that the existence or extent of DBS operations in the Los Angeles area and the financial status of L.A. County in 1988, as well as the expenses which would be incurred in relocating to other channels, are all unknown at this time. USSB maintains that L.A. County does not support its assertion that all alternative channels will be authorized to others if prompt action is not taken, and insists that the proceedings in General Docket No. 82-334 guarantee the availability of alternate frequencies.[16]

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operational now, and proposes that none will be operating by 1988, while Aerospace and AFTRCC are making substantial and continuing use of the frequencies for vital support of the aerospace industry and national defense.

[16] STC argued that the petition is premature because of outstanding petitions for reconsideration of *First Report and Order* in General Docket 82-334, *supra*, which authorized the additional spectrum for FS users who will be required to relocate in accordance with the *DBS Order*, *supra*. STC also pointed to the then pending Court of Appeals review of the Commission's obligation to displaced public safety FS users in the context of the appeal of *DBS Order*, *supra*. Since

16. USSB argues that the past reimbursement decisions relied upon by L.A. County do not support the County's claim. It contends that the Commission has required the newcomer to pay for an incumbent's expenses only in limited and unique circumstances involving services of equal primacy. It concludes that the instant situation is distinguishable because DBS will be the only primary user of the DBS band after September 1988. DBSC asserts that the circumstances here are distinguishable from those in the cases cited by L.A. County because DBS is a new technology rather than an existing service.

17. USSB states that Section 9 of the Federal Communications Commission Authorization Act of 1983 requires only that the Commission establish a plan and make spectrum assignments which recognize the needs of state and public safety authorities. It concludes the Commission satisfied its statutory obligation by making accommodations for displaced FS users, including authorizing more spectrum in the *First Report and Order* in Gen. Docket 82-334, *supra*. DBSC and USSB argue that L.A. County has not demonstrated that its public safety services would be unavoidably threatened, since the petition does not allege that the integrity of safety and emergency services is wholly dependent on the continued use of the 12 GHz band due to technical limitations.

18. USSB believes that the alternative relief, extending the relocation deadline until September 1993 while allowing L.A. County to obtain authorizations for replacement channels now, is an indirect means of requiring reimbursement, as it would negate any incentive to vacate the 12 GHz band without compensation. According to USSB, this would give L.A. County leverage to excise more than the actual losses resulting from the early retirement of equipment.

19. Many of the prospective DBS operators challenge whether a grant of special relief, particularly mandatory reimbursement from DBS operators, would be in the public interest. Western Union and DBSC contend that reimbursement would pose such a heavy financial burden on the DBS industry that DBS service might be delayed or precluded entirely. DBSC further points out that the Commission concluded in *DBS Reconsideration*, *supra*, that mandatory reimbursement would not be in the public interest. The DBS operators also fear that grant of the requested relief would

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the filing of STC's comments, the petitions for reconsideration in General Docket 82-334 have been disposed of and the Court of Appeals has issued its decision concerning the *DBS Order*. *Memorandum Opinion and Order* in General Docket 82-334, *supra*; *NAB v. FCC*, *supra*.

open the floodgates to other petitions, thereby increasing the financial burden on DBS entry, and would have a far reaching precedential effect on future Commission actions in making allocations for new technologies. DBSC stresses the administrative burden on the Commission to monitor any reimbursement.

20. The opposing parties finally argue that the documentation of L.A. County's financial ability to comply with the relocation schedule is vague or otherwise inadequate and that L.A. County has not conclusively demonstrated that it could not afford the relocation costs. USSB argues that if L.A. County's request for special relief is predicated on insufficient funds, then it must detail its current and projected revenues and expenses. USSB contends that the relevant concern is the ability to relocate, not the financial impact of such relocation. It maintains that the County has as much as admitted its ability to pay for relocation, if required, when it listed, in response to the Bureau's letter, the cutbacks it would have to make to pay for relocation.

21. Although none of the prospective DBS operators have presented counter proposals specifying an actual cost of relocating, they do dispute whether the amount sought by L.A. County is a true reflection of added costs which would be incurred as a result of relocation. CBS believes that any cost relocation formula should be limited to those expenses and costs necessitated by a relocation of L.A. County's 12 GHz links that would not have been incurred in connection with normal replacement of the 12 GHz microwave equipment, added to the imputed interest, appropriately discounted for the expenses and costs that would have been incurred in connection with the normal replacement of the 12 GHz equipment. USSB believes that the actual loss to L.A. County should be based on that portion of its investment in existing equipment that will be undepreciated and stranded by the need to replace the equipment before the end of its useful life, adjusted by the difference in cost between 12 GHz and replacement equipment in other bands. It argues that all equipment has a limited life and that replacement is budgeted, even if there is no depreciation reserve maintained for tax purposes. USSB further contends that L.A. County is not currently using its transmission capacity fully,[17] and further notes that the L.A. Sheriff has apparently applied for additional mobile channels, with sufficient funds to construct and operate these facilities.

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[17] USSB cites *Limited Spectrum Occupancy Study*, FCC/FOB 84-01 (Feb. 1984).

Oppositions to AFTRCC

22. STC and USSB contend that AFTRCC's petition was effectively a request for rulemaking, within the Chief Scientist's jurisdiction, as it did request spectrum reallocation and would have required revision of Sections 94.93 and 2.106 of the Commission's rules.[18] All three opponents contend that the assertions upon which AFTRCC's petition is based are speculative and premature. They point out that the relocation deadline is still years away, and insist that there has been substantial growth in DBS in the last few years, as well as substantial investment by DBS firms and others in related industries. USSB argues that AFTRCC has not shown that the compliance problems are any greater than assumed when the DBS allocation decision was initially made and affirmed.

Discussion

23. The DBS rulemaking proceeding, General Docket 80-603, addressed public interest concerns at length, and the Commission gave considerable attention to the public interest merits of compensation and other accommodations for displaced users. *DBS Order, supra.* The Commission concluded that the public interest would be best served by dedication of the 12.2-12.7 GHz band to DBS service, which would result in: (1) the initiation or increase of service to unserved or underserved remote areas; (2) an increase in service and diversity throughout the country; (3) programming better suited to viewers' tastes; (4) innovative entertainment services; and (5) expanded nonentertainment services. *DBS Order, supra* at 680-82. FS operators were reduced to a secondary, strict noninterference status after September 1988, and it was explicitly determined that the public interest would be served by allowing DBS operators to proceed without generally providing reimbursement to FS operators.[19] The Court of Appeals specifically ratified

[18] Section 94.93 contains provisions for private operational-fixed use of the 12,200—12,700 MHz band, including the transition date and alternate frequencies. Section 2.106 is the Table of Frequency Allocations.

[19] The circumstances in which mandatory reimbursement has been granted in the past are different from those presented here in several significant respects. *Harold A. Jahnke, supra,* and *Sudbrink Broadcasting of Georgia, Inc., supra,* each involved a newcomer that would cause interference to an existing licensee in the same service. See also, *FM Table of Assignments, supra* at 164. In *Athens Broadcasting Co., Inc., supra,* and in a letter to *Broadcast Corporation of Georgia, supra, recon. den., Broadcast Corporation of Georgia,* 96 FCC 2d 901 (1984), the Commission respectively required and permitted compensation in cases involving different services where it was specifically found to serve the

the Commission's express judgment "that the public interest warrant[s] preferring DBS to FS even if significant costs were thereby imposed on FS users." *NAB v. FCC, supra* at 1211.

24. The Commission continues to support the development of DBS as an important potential addition to the availability, diversity, and technical enhancement of video programming, and hereby reaffirms its allocation decision. While the Commission recognizes the need to revisit assumptions upon which its actions may be taken, no significant changes or events have occurred subsequent to the *DBS Order, supra,* or the *DBS Reconsideration, supra,* which would undermine earlier findings or conclusions. Thus, there is no basis for altering the determination that, as a general policy, the public interest would neither be served by the general reimbursement of displaced 12 GHz users, nor by the extension of time in which they would remain primary users of the band. Nowhere in its decisions to date has the Commission explicitly indicated that its allocation decision was based on an expectation as to what particular date would see the first DBS transmission. The Court of Appeals expressly recognized this when affirming the Commission's action.[20] The Commission was and is aware that time is required for DBS operations to develop. DBS is an entirely new technology and industry, developing on a completely new set of operational parameters. Even a conventional satellite takes several years to design, build, and launch. DBS additionally requires novel satellite designs and original satellite components, as well as terrestrial hardware that is new in concept and design. Furthermore, contrary to various petitioners' assertions, the DBS industry is actively progressing. Subsequent to the pleadings filed by L.A. County and the parties opposing a grant of special relief, several DBS permittees proposing to serve the Los Angeles area have been assigned channels and orbital positions, pursuant to their completion of contracting for construction of their satellites. Permits have also been issued to "second-round" and "third-round" DBS applicants. *Satellite Syndicated Systems, Inc.*, 99 FCC 2d 1369 (1984); *RCA American Communications, Inc.*, Mimeo No. 7115, released September 19, 1985 (M. M. Bur.). Some permittees presently propose to be

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public interest. Unlike the instant situation, the Commission had not adopted standards to define objectionable interference between the services involved and the conflicting communications services enjoyed equal entitlement to the disputed spectrum.

[20] "[T]he Commission acted against an evolving background . . . the actual amount of space on the 12 GHz band that novel DBS technology will in fact occupy can [not] be known at the present." *NAB v. FCC, supra* at 1211.

operating by or shortly after September 1988. Thus, several parties have stepped in to fill the shoes of those which dropped their pursuit of DBS.[21] Also, two of the original DBS construction permits were cancelled by the Commission over the permittees' objections, and one of those permittees actively contested that action.[22] Those parties have filed new proposals and now hold new DBS construction permits.[23]

25. To mitigate expenses for the displaced FS operators, the Commission provided a five-year transition period, and sanctioned voluntary compensation agreements to facilitate relocation and interference-free operation. *DBS Reconsideration, supra* at 746. The transition period was calculated to give FS users additional time to meet expenses which would be incurred, as well as allow use of a greater percentage of the equipment's useful life prior to relocation.[24] No party contests this stated basis for the transition period, and this previous judgment will stand.[25] It is important to point out that FS operators are not required to relocate, but to operate on a secondary basis to existing DBS operations after that time. It is a relatively simple matter for them to monitor the construction progress of the various DBS satellites to predict for themselves launch and service dates sufficiently early to allow time for construction, if they choose to so delay. This is a much more direct and effective way for any desired adjustments in timing to be made than continual Commission intervention.

26. In the case of public safety services, the Commission went even further to accommodate any State or local authority whose limited resources might prevent it from taking advantage of the new allocations. It made clear that it would not permit vital public safety services to suffer when it stated that, "If faced with

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[21] One petitioner's position is apparently based on the erroneous conception that only one of eight of the original DBS applicants has persevered. Aerospace at 2. In fact, three first-round applicants have maintained their construction permits with due diligence in the construction of their satellites. There is some disputation by current DBS permittees of any characterization of former applicants as "major" or "significant" players.

[22] *CBS, Inc.*, 99 FCC 2d 564 (1984); *Graphic Scanning Corporation*, FCC 85-107, released March 12, 1985.

[23] *RCA American Communications, Inc., supra.*

[24] *DBS Order, supra* at 693; *DBS Reconsideration, supra* at 743.

[25] Aerospace contends that an anticipation that "several DBS systems will be in operation by 1988," was a principal basis for setting September 1988 as the relocation deadline, citing paragraph 28 of *First Report and Order* in Gen. Docket No. 82-334, *supra.* That statement, taken in context, is only the Commission's recommendation that current users not remain on the band on secondary status after the deadline as several DBS systems could be in operation by then, restricting the FS use.

specific cases involving severe hardship or potential risk to public safety, [the Commission] has both the duty and the means to address and rectify them as they arise." *DBS Reconsideration*, *supra* at 751. Specifically, the Commission stated that it would consider extending the transition date for a limited period or require compensation from DBS operators if such relief was necessary to preserve a public safety service. This decision to grant special relief where warranted assures that the reallocation of the 12 GHz band for DBS will not prevent government authorities from meeting their public safety communication obligations. Moreover, the Court of Appeals found that *DBS Reconsideration*, *supra*, and the Commission's representations to the Court, resolved any doubts that might have existed regarding the Commission's recognition of its responsibilities to public safety services. *NAB v. FCC*, *supra* at 1214.

27. An award of relief, however, is not compelled absent a showing that relief is essential to protect public safety operations. Section I of the Communications Act of 1934, as amended, states, in relevant part, that the purpose of the Communications Act is "promoting safety of life and property through the use of wire and radio communication. . . ." 47 U.S.C. § 151. The Communications Amendment Act of 1982 states, in relevant part, that "[i]n taking actions to manage the spectrum to be made available for use by private land mobile services, the Commission shall consider, consistent with Section 151 of this title [Section 1 of the Act], where such actions will (1) promote the safety of life and property . . . ." Section 9 of the Federal Communications Commission Authorization Act of 1983 states, in relevant part, that the Commission shall "(a) . . . establish a plan which adequately ensures that the needs of State and local public safety authorities would be taken into account in making allocations in the electromagnetic spectrum . . . and (b) pending adoption of a plan, the Commission, while making assignments and allocations, shall duly recognize the needs of State and local public safety authorities." Based on these statutory provisions, the Court in *NAB v. FCC*, *supra* at 1213-14, concluded only that the Commission is required to give the "needs" of public safety spectrum users "priority" over those of commercial broadcasters, such as DBS operators, and to assure the integrity of vital public safety services.[26] To satisfy this obligation, the Commission has

[26] L.A. County's arguments relating to the Commission's statutory obligations to public safety were made and addressed in *NAB v. FCC*, *supra*. Hence, we do

already allocated spectrum in other bands to meet the needs of FS users, including the public safety needs of state and local authorities. This spectrum was provided, on an expedited basis, in *First Report and Order* in General Docket 82-334, *supra*, which assured that there was sufficient spectrum for displaced FS users and that the most desirable spectrum in terms of cost and propagation characteristics was available. In addition to these steps that have been taken to accommodate FS users, the Commission will rectify specific cases involving severe risk to the public safety as they arise. *DBS Reconsideration*, *supra* at 751. But any party seeking special relief or waiver "faces a high hurdle, even at the starting gate," and must "plead with particularity the facts and circumstances" warranting relief. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (1969).

L.A. County

28. L.A. County has advanced such facts and circumstances to justify its requested relief. It has demonstrated that it has legitimate needs for a reliable communications network to perform its varied public safety functions. It has demonstrated that each of the existing microwave links at issue is regularly used for and is essential to vital public safety services. The subject links were built well before there was any indication of a possible restriction on their use. The County is correct in insisting that essential emergency communications must be protected even where other uses are also present.[27] The importance and entitlement to protection of these services are not reduced by the ancillary benefits the County enjoys by piggybacking administrative uses, although any relief awarded should also account for this extra benefit thereby conferred on the County. A question also remains as to the extent to which adverse consequences can be strictly attributed to early retirement of equipment which, according to the County, is nearing the end of its useful life anyway.[28] Although Proposition 13 has limited the County's revenue-generating capability, and hence its spending ability, it is the County's taxpayers who enjoy the benefits of this restriction. DBS operators maintain that they should not be forced to assume

not need to reconsider the substance of those arguments which are repeated in the instant petition.

[27] Similarly, even if full capacity is not utilized on some links, as contended by USSB, the necessity for other links in other geographic locations is not reduced.

[28] Clearly, L.A. County would enjoy benefits of any new equipment which would outlast its current equipment.

the burdens which the local populace places on itself as a result of self-determined fiscal policies. But, the County has also shown that there will be considerable expenses involved in relocating its communications system, and that the County must operate within prescribed budgetary limitations. The County has not, and perhaps cannot, make clear the precise effects that would result from relocation of the microwave system. In balancing its needs between personnel and communications facilities, the number of police or fire personnel that the County might elect to lay off, to pay for equipment modification or replacement, as opposed to other possible cost-saving measures taken in those or other County budgets, is subject to a number and variety of decisional factors. Furthermore, the Commission will not require that any particular number or percentage of police or fire jobs be at risk in order to justify consideration of relief.

29. Despite this lack of precision in calculating the possible harmful effects of forced relocation of L.A. County's public safety communications system and in allocating responsibility for them, the hard fact remains that some serious negative impact on public safety services is almost certain to result. The Commission has repeatedly recognized the importance of, and its role in, protecting these services. (See paras. 27, 28, *supra.*) That attitude is confirmed by the action it will take herein. Consequently, the questions become: how much of the burden of relocation must be placed on the DBS operators to avoid endangering public safety services, and what form of relief should be awarded?

30. It is immediately obvious that appropriate monetary compensation cannot be calculated on the basis of the information presented here. The alternate relief requested, extension of the period for retaining primary status in the band for five additional years, obviates the need for further information and should provide an effective form of relief for the County. It will provide the County sufficient opportunity to budget the necessary funds.[29] In the interim, any DBS operations will not interfere with the County's microwave communications. While there will obviously be an expense to the County, it is an expense the County would soon incur anyway, and the County will enjoy the full benefits of a new system and equipment. Further, the County has tacitly conceded its ability to pay on such an extended timetable by seeking that relief. It is noteworthy that the negative effect of this relief on DBS may be limited, although significant. It

[29] It will also provide the County ample time to secure bids, let contracts, and complete construction of the entire system prior to the extended deadline.

appears from a comparison of the interference pattern for the links with the map of the system, both submitted in the County's June 17 response to the Bureau's April 26 letter, that L.A. County's microwave system can operate without completely obliterating DBS service in the County. Each microwave link is highly directional and operates along a narrow corridor, thereby affecting only a small percentage of the County's area and viewers. There are a limited number of links in the County's system, so that their operational corridors collectively cover a discrete, although fairly large, amount of the County's area and homes. Furthermore, several of the microwave links are in directions sufficiently removed from the pointing angles of DBS reception dishes to further reduce the interference potential for the channels they operate on to levels that can be overcome by increased capacity or sensitivity of receiving equipment. Given the number of DBS channels available, DBS operators may be able to tailor their use of particular channels to further reduce the the significance of the negative impact. This impact can be further reduced if L.A. County, in order to meet its new relocation deadline, phases in its changes over a period of time, so that relief along some corridors would occur prior to September, 1993. Accordingly, L.A. County will be permitted to continue to operate the subject microwave links on a primary basis until September 9, 1993. The County is expected to honor in good faith, to the extent possible, any expressed preferences of the affected DBS operators in the order of its link replacements.

31. The Commission is aware of the precedential implications of this decision to afford relief to a public safety operator. It is the position of some prospective DBS operators that a grant of special relief to L.A. County might result in an undue administrative burden for the Commission, a flood of applications for special relief or a precedent which would be detrimental to DBS and to other later emerging technologies. These parties, however, have demonstrated no attempt to ascertain the actual impact to which this precedent will expose them. Furthermore, despite these concerns, the integrity of public safety operations must be maintained. Thus, any further petitions by other public safety operators will be judged on their individual merits, although the demonstrated cumulative effect on any relief to be granted may be weighed in determining the nature or extent of such relief.

32. Section 94.51 of the Commission's Rules[30] will be waived

[30] Fn. 2, *supra.*

for L.A. County to extend the County's construction period for channels authorized in General Docket 82-334 until September 9, 1993, and the staff is authorized to condition the grant of authorizations for replacement channels appropriately. This is necessary for the relief to be effective, so that L.A. County can make its plans and secure channels immediately for its extensive system without concern for the three-year construction period.

AFTRCC

33. In marked contrast to L.A. County, AFTRCC did not make any of the demonstrations critical to an award of relief, and the Chief Scientist's action in dismissing AFTRCC's original petition was fundamentally correct. The Commission stated its intention to consider petitions for relief, but only in specific cases where specific facts involving severe hardship or potential risk to public safety services are advanced. *DBS Reconsideration*, *supra* at 1214. AFTRCC does not fall into the limited category of public safety users that can be protected from the burden of relocation. It showed neither an inability to comply with the relocation requirement nor any threat to "vital public safety services" resulting from its required compliance. Furthermore, AFTRCC made no showing that the problems and expenses of relocation for FS users generally, or itself particularly, projected to be any greater than assumed by the Commission when it decided to require uncompensated relocation.

34. In its original petition, AFTRCC asked that:

> At a minimum, the Commission should extend the transition period for OFS users from five to ten years or until September 9, 1993; consider whether the full 500 MHz allocation is still necessary for DBS, or whether some form of band sharing with OFS users is feasible; and conduct further reviews of the status of, and prospects for, DBS in the future. (Petition at 4.)

Clearly, AFTRCC's petition could not be construed as a petition for special relief, and it was dismissed under delegated authority (47 C.F.R. § 0.281) as a request for rulemaking. The requested extension of the transition period would be applicable to all OFS users, regardless of whether or not they were involved in public safety and regardless of the severity of financial impact of displacement on specific users. Such a general extension of the transition period would require a revision to Section 94.93 of the Commission's Rules. Likewise, a change to the size of allocation for DBS or a change to the sharing arrangement would require a

revision to Section 2.106 of the Commission's Rules.

35. In its application for review, AFTRCC contends that even if the staff did not exceed its authority in treating AFTRCC's petition as a request for rulemaking, the dismissal of the petition was arbitrary and capricious. AFTRCC's position now appears to be entirely dependent on its assertion that the cost of relocation ultimately may prove unnecessary, and that the Commission should delay implementation of its relocation requirement.[31] This position is, in turn, premised on the contention that DBS is not developing as predicted when the spectrum allocation was made and the relocation timetable set.[32] Those positions have been rejected above (paras. 23, 24) and the relief sought shown to be unnecessary (para. 25). Therefore, AFTRCC's request to overturn the staff's action dismissing its petition for relief will be denied.

36. Accordingly, IT IS ORDERED, That the Petition for Special Relief filed by the County of Los Angeles IS GRANTED to the extent indicated above, and Section 94.51 of the Commission's Rules IS WAIVED for Los Angeles County, to the limited extent indicated above.

37. IT IS FURTHER ORDERED, That the Application for Review, filed by American Flight Test Radio Coordinating Council IS DENIED.

38. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send by *Certified Mail — Return Receipt Requested*, a copy of this *Memorandum Opinion and Order* to each of the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[31] In the application for review, AFTRCC recharacterizes its request, saying that the main thrust of the original petition was to request a reasonable extension of the transition period for OFS licensees and that the request to revisit the question as to whether DBS still warranted a full 500 MHz allocation was only a suggestion.

[32] Harris again questions the adequacy of the relocation spectrum. It specifically claims that 17 GHz use is still subject to reconsideration and that 18 GHz frequencies are not equivalent to the 12 GHz frequencies at issue. All petitions for reconsideration of the Commission subject action in the 17 GHz band have been rejected in *Memorandum Opinion and Order* in Gen. Docket No. 82-334, FCC 85-271, released May 24, 1985. The Commission has already recognized the differences between 12 GHz and 18 GHz and the consequences of those differences, in making its allocation decision.

Action Appealable
Bankruptcy
Intervention, Request for Denied

Review Board affirms ALJ ruling denying petition to intervene in broadcast renewal and assignment proceeding. Petitioners attempt to regain control over licensee corporation from the trustee in bankruptcy was a subject more appropriate for the court which has primary jurisdiction over the receivership. Moreover, petitioners claim that he had evidence to offer adverse to the party-applicants was not sufficient to warrant full party status since Rule 1.225 allows non parties to give relevant evidence.

—Daniel Meister

MM Docket No. 83-955

FCC 85R-46

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Daniel Meister, Trustee in Bankruptcy for New Haven Radio, Inc.	MM Docket No. 83-955 File No. BR-801201VG
For Renewal of License of Station WNHC, New Haven, Connecticut	
Daniel Meister, Trustee In Bankruptcy for New Haven Radio, Inc. (Assignor)	MM Docket No. 83-956 File No. BAL-821118GB
and	

Wardoco, Inc. (Assignee) For Consent to the Assignment of License of Station WNHC New Haven, Connecticut Southern Connecticut Radio New Haven, Connecticut For a Construction Permit	MM Docket No. 83-957 File No. BP-810302AB

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1985; Released: June 10, 1985

BY THE REVIEW BOARD:

1. We here consider the merits of a misdirected and misstyled appeal from a presiding Administrative Law Judge's denial of a petition to intervene, FCC 83M-4773, released December 21, 1983. For the reasons set out below we affirm the ALJ's ruling.

2. On May 23, 1985 the Associate General Counsel-Litigation referred to the Review Board a pleading filed on January 5, 1984 by Anthony R. Martin-Trigona which had incorrectly been styled Emergency Application for Stay Pending Review And Application for Review: [Emergency/Immediate Review].[1]* In reality, this pleading was an appeal from a Memorandum Opinion and Order, *supra*, of presiding Administrative Law Judge (ALJ) Frysiak denying Martin-Trigona's petition to intervene in this proceeding.

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* The pleading was not acted upon previously, perhaps because it was erroneously directed to the Commission rather than the Board. Discovery of the pleading occurred when the Litigation Division of the Commission's Office of General Counsel was reviewing the record in this proceeding in response to an inquiry from the Court of Appeals concerning the status of the voluntary assignment of the Station WNHC license from Daniel Meister, Trustee in Bankruptcy, to Wardoco, Inc. The Court had requested the information on May 13, 1985 during oral argument in *New Haven Radio, Inc.* v. *FCC*, No. 84-1163 (D.C. Cir.), a case involving the earlier involuntary transfer of Station WNHC(AM), New Haven, Connecticut from Martin-Trigona to Daniel Meister, trustee in bankruptcy. Letter to the Clerk of Court from Daniel M., Armstrong, Associate General Counsel, dated May 17, 1985. The Court has been advised that the matter has now been brought to the attention of the Board.

hile the misdirected appeal was pending, the ALJ: (1) approved a joint motion, filed January 16, 1984 by Daniel Meister, trustee in bankruptcy for New Haven Radio, Inc., licensee of Station WNHC(AM), New Haven, Connecticut (trustee) and Southern Connecticut Radio, for approval of settlement agreement, under which agreement Southern Connecticut Radio would receive reimbursement of its expenses up to a $30,000 maximum in return for dismissing its application (FCC 84M-1059, released March 2, 1984); (2) dismissed the application of Southern Connecticut Radio pursuant to the settlement agreement; (3) granted the renewal application of the trustee (FCC 84M-2518, released June 6, 1984); (4) approved an assignment agreement between the trustee and Wardoco, Inc. (*id.*) (5) granted the application for consent to the assignment of license of Station WNHC to Wardoco, Inc. (*id.*); and (6) terminated the proceeding (*id.*). Additionally, numerous pleadings subsequently filed by Martin-Trigona seeking, among other things, to reopen the proceeding — which were treated as an appeal from the ALJ's Order terminating the proceeding — were earlier dismissed by the Board on the ground that it lacked authority to consider the pleadings since the appeal was not filed until after the ALJ's ruling had become final. Order, FCC 84R-88, released December 5, 1984. Commission review of our Order has not been sought.

3. The sole issue now before the Board is the propriety of the ALJ's ruling denying Martin-Trigona's earlier filed petition to intervene. Section 1.223(c) of the Commission's Rules, 47 CFR 1.223(c), which governs petitions to intervene filed later than 30 days after publication in the Federal Register of the hearing issues, requires that persons desiring to intervene "shall set forth the interest of petitioner in the proceeding, show how much petitioner's participation will assist the Commission in the determination of the issues in question . . . [and] set forth reasons why it was not possible to file a petition within [30 days after publication in the Federal Register] . . . . If, in the opinion of the presiding officer, good cause is shown for the delay in filing, he may in his discretion grant such petition . . . . " Here, noting that the Hearing Designation Order (Mimeo No. 6377, released September 14, 1983) was published in the Federal Register on September 19, 1983 (48 Fed. Reg. No. 182, 41812) and that Martin-Trigona's petition to intervene was not filed until Novem-

ber 23, 1983 (after the 30 day filing period) the ALJ concluded that petitioner's explanation concerning his tardiness did not constitute good cause within the meaning of Section 1.223(c). The explanation that petitioner only learned on November 18, 1983 that he was not a party after receiving a letter from the ALJ (dated November 2, 1983) to that effect was found inadequate in light of the express language in note 1 of the earlier Designation Order that allegations raised by Martin-Trigona may only be raised if Martin-Trigona was granted party status. The Designation Order had referred Martin-Trigona to that section of the rules governing petitions to intervene. Martin-Trigona's appeal, itself, is silent concerning the ALJ's adverse finding on timeliness. We fully concur with the ALJ's finding and note that he would have been within his discretion in denying the petition to intervene on this ground alone. *See Middle Georgia Broadcasting Co.*, 32 FCC 2d 974 (Rev. Bd. 1972).

4. In any event, however, the ALJ considered petitioner's arguments on the merits and found them insufficient to justify intervention. We note by way of background that until recently Martin-Trigona was the president and sole stockholder of New Haven Radio, Inc., the licensee of Station WNHC. On September 10, 1980, New Haven Radio filed a voluntary petition in the Southern District of New York for Chapter 11 reorganization, which ultimately resulted in the appointment of Daniel Meister as trustee in bankruptcy of the estate, an appointment which has remained in effect throughout this proceeding. Martin-Trigona has been actively seeking to regain the station ever since.

5. In response to Martin-Trigona's claim that he had a right to be heard since he was seeking the return of the broadcast license, the ALJ observed that his attempt to regain control of the licensee corporation was a subject more appropriately to be considered by the bankruptcy court which transferred control to a trustee in bankruptcy rather than by the Commission. We agree for this observation was fully in accord with prior Commission precedent. *See, e.g., Edward H. Dillon, Receiver*, 42 FCC 2d 203, 27 RR 2d 1629 (1973) (Commission deems it improper to institute independent inquiry into the propriety of the receivership, leaving such inquiry to the court which has primary jurisdiction over the receivership). The ALJ's comment was particularly appropriate in this proceeding since the court of competent jurisdiction has already authorized the sale of Station WNHC. *See In Re Anthony R. Martin-Trigona*, No. 84-5040, slip op. at 3220 (2nd Cir. April 8, 1985) (Circuit Court affirms order of the United States District

Court for the District of Connecticut approving the sale of Station WNHC).

6. Martin-Trigona's remaining arguments to the ALJ were that he had evidence to offer concerning both misconduct by a principal of Southern Connecticut Radio and the lack of financial and legal qualifications on the part of the assignee, Wardoco, Inc. The ALJ held that these arguments did not constitute sufficient interest to warrant party status since Section 1.225 of the Commission's Rules, 47 CFR 1.225, permits a non-party to give relevant, material, and competent testimony at hearings by notifying the Secretary of the Commission. We agree with the ALJ. Recognizing that Section 1.225 permits ample participation by non-parties at hearing, the Board has held that an attempt to intervene, in order to prevent the grant of an application of an allegedly unqualified party, is not sufficient to justify full party status "replete with discovery and subpoena rights as well as cross-examination rights on issues already designated." *East Hampton Broadcasting Co., Inc.*, FCC 84R-65, released September 20, 1984. The public interest role of assuring a complete and thorough fact finding inquiry "can be and has traditionally been fulfilled by the ALJ and the Mass Media Bureau." *Id.* Moreover, any allegation regarding Southern Connecticut Radio is now moot since its application has been dismissed, see para 2; and many of Martin-Trigona's allegations, including those relating to finances, concerning Wardoco, Inc. have already been considered in the bankruptcy proceeding by the Second Circuit. *In Re Anthony R. Martin-Trigona, supra*, slip op. at 3242-3243. Furthermore, charges pertaining to the adequacy of finances, are belied by the fact that Wardoco, Inc. has made its down payment on the purchase price. *Id.* Thus, appellant has not shown how its participation could have assisted the Commission in resolving any issues in this proceeding. In sum, based on the allegations submitted to the ALJ and upon review of the arguments contained in the appeal, we conclude that the ALJ properly denied Martin-Trigona's petition to intervene.

7. ACCORDINGLY, IT IS ORDERED, That the Emergency Application For Stay Pending Review and Application For Review: [Emergency/Immediate Review], filed January 5, 1984, by Anthony R. Martin-Trigona IS DENIED; and

8. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order SHALL BE SERVED by Certified Mail, Return Receipt Requested, upon Anthony R. Martin-Trigona at his last known address, P.O. Box 2002, New York, N.Y., to

10185-2002, and Pembroke Station, Danbury, Connecticut 06811-3099 and upon Paul Taylor, P.O. Box 7146, FDR Station, New York, N.Y. 10150.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Emergency Broadcast System
Notice of Commission Action
Rules, Waiver of

Commission granted waiver of Section 73.961(d) of the rules to allow the broadcasters in San Diego/Imperial Counties Emergency Broadcast System (EBS) Operational Area to optionally use an alternate text when conducting their weekly EBS test.
—EBS Weekly Test Script Waiver

FCC 85-528

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Request for Waiver of Section 73.961(c) of the Commission's Rules	IN REPLY REFER TO: 22900

Adopted: September 27, 1985; Released: October 4, 1985

Mr. Steve Danon
Operations Officer
Office of Disaster Preparedness
Unified San Diego County
Emergency Services Organization
5201-Q Ruffin Road
San Diego, CA 92123

Dear Mr. Danon:

This is in reference to your letter of August 23, 1985 in which you request a waiver of Section 73.961(c) of the Commission's rules to permit the broadcasters in the San Diego County area to use optional wording when conducting the weekly Emergency Broadcast System (EBS) test announcement.

Your waiver request is hereby granted to allow the radio and television stations located in the San Diego/Imperial Counties EBS Operational Area to *optionally* use an alternate text for their EBS Weekly Transmission of the Attention Signal and Test

Script. The Commission feels that there is sufficient justification to warrant this waiver request for the San Diego/Imperial Counties area due to the proximity of the San Andreas Fault and the preparation that the Federal, State, and local governments and the public have taken regarding earthquake hazards. The following language may be used in lieu of the script on page 6 of the EBS Checklist for Participating stations and on page 4 of the EBS Checklist for Non-Participating stations:

> "This is a test of the Emergency Broadcast System. Many of the broadcasters in the San Diego/Imperial Counties Area in cooperation with Federal and Local Officials have developed this system to keep you informed in the event of an earthquake or other emergency. If there had been an earthquake or other emergency, the Attention Signal you just heard would now be followed by news, official information or instructions. Be prepared! Study the section in your telephone directory that provides information on how to safeguard yourself and your family in the event of an earthquake or other emergency. Contact your local disaster preparedness office for additional information. This concludes this test of the Emergency Broadcast System."

BY DIRECTION OF THE COMMISSION

WILLIAM TRICARICO, *Secretary*

Ownership and Management, Integration of
Partnership Agreement
Remand

Review Board remands comparative TV broadcast proceeding for inquiry into limited partner's role in limited partnership. Such inquiry is necessary for proper evaluation of integration credit to be given when circumstances indicate limited partner may have had power to influence operation.

—*Family Media, Inc.*

MM Docket No. 83-727

FCC 85R-85

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FAMILY MEDIA, INC. Honolulu, Hawaii	MM Docket No. 83-727 File No. BPCT-830110KE
CHANNEL 5 BROADCASTING ASSOCIATES Honolulu, Hawaii	MM Docket No. 83-728 File No. BPCT-830223KF
POLYNESIAN SERVICES CORPORATION Honolulu, Hawaii	MM Docket No. 83-730 File No. BPCT-830223KJ

KA'IKENA LANI TV CORPORATION Honolulu, Hawaii	MM Docket No. 83-731 File No. BPCT-830223KK
MEDIA CENTRAL, INC. (KHAI-TV) Honolulu, Hawaii	MM Docket No. 83-732 File No. BPCT-830223KL
Down To Earth, Inc. d/b/a/ TV 5 of HONOLULU Honolulu, Hawaii	MM Docket No. 83-733 File No. BPCT-830223KM
For Construction Permit for a New TV Station	

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 1985; Released: October 24, 1985

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Family Media, Inc. (FMI), Channel 5 Broadcasting Associates (Channel 5), Polynesian Services Corporation (Polynesian), Ka'Ikena Lani TV Corporation (Ka'Ikena), and Down to Earth, Inc. d/b/a/ TV 5 of Honolulu (TV 5)[1] for authority to construct a new television station to operate on Channel 5 in Honolulu, Hawaii. In an *Initial Decision* ("*I.D.*"), FCC 85D-13, released March 7, 1985, Administrative Law Judge (ALJ) John M. Frysiak granted Channel 5's application, finding it to be comparatively the superior applicant. The proceeding is now before the Review Board on exceptions filed by FMI, Polynesian, Ka'Ikena, and TV

[1] On April 26, 1985, TV 5 filed a petition asking leave to amend its application to report that the name of the corporation had been changed to Healthy's Natural Foods, Inc. The tendered amendment also reports a change in the address of one of its officers. We will grant this petition. TV 5 also submitted petitions on June 6, 1985, July 1, 1985, and October 21, 1985, requesting that amendments reporting further address changes be accepted. We will also grant these petitions.

5, and limited exceptions filed by Channel 5. Replies were filed by all five of these applicants.[2] Oral argument was held on August 7, 1985. For the reasons set forth below, we find that this proceeding must be remanded to the ALJ for inquiry into whether Channel 5's limited partner exercises sufficient control over the applicant that he must be treated as more than a passive investor for purposes of comparative evaluation and integration credit.

2. Channel 5 is a limited partnership organized under the Uniform Limited Partnership Act of the State of Hawaii. The partnership consists of two general partners, Dr. Carol Santoki Dodd and Ms. Mildred Tina Kaneshiro, both residents of Honolulu, and one limited partner, Mr. Phillip Tunis, a resident of Rye Brook, New York. *I.D.*, paras. 13, 37, 39. Channel 5 proposes to integrate both Dr. Dodd and Ms. Kaneshiro into the operation of its proposed station full time. Dr. Dodd is proposed to serve as general manager, and Mrs. Kaneshiro is proposed as general sales manager and public affairs director. *I.D.* paras. 37, 39. The ALJ's decision toward the construction permit to Channel 5 turned primarily on his award of 100% quantitative integration credit to Channel 5 and the enhancement of that proposal because of various attributes of Dr. Dodd and Ms. Kaneshiro. The ALJ found that Channel 5's proposal was enhanced by 100% local residence, 100% minority ownership, 100% female ownership, 100% civic involvement, and 50% broadcast experience. *I.D.*, paras. 72, 78. All of the other applicants who filed exceptions object to the ALJ's award of 100% integration credit to Channel 5. All claim that the ALJ unduly limited inquiry into the *bona fides* of Channels 5's limited partnership arrangement. All (except FMI) state that, at the very minimum, a remand is necessary to develop a record upon which to base a determination of whether Tunis exercises such control over Channel 5 that he should be included when evaluating its integration proposal. FMI, TV 5, and Ka'Ikena also argue that the limited amount of information that already is in the record (basically the partnership agreement (Attachment to Channel 5 Exh. 1)) is sufficient to support a finding that Tunis does have control of the applicant, and that consequently he should be treated as a controlling partner, thereby significantly reducing Channel 5's integration credit.[3] We

[2] The sixth applicant, Media Central, Inc. (KHAI-TV), did not except to the ALJ's denial of its application. We will consequently dismiss its application with prejudice for failure to prosecute, pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR §1.276(f).

[3] FMI and TV 5 state that Channel 5's integration credit should be reduced to 66 2/3%, (*i.e.*, that Tunis should be considered as co-equal to Dodd and

believe that the present record is insufficient to resolve this matter and that a remand is therefore required.[4]

3. The other applicants challenged the validity of Channel 5's partnership arrangement before the ALJ. In addressing these challenges, the ALJ stated that no one had contended that Channel 5's partnership agreement did not conform with the provisions of the Uniform Limited Partnership Act. He also found that the agreement clearly placed control over the operation of the proposed station in the hands of the general partners. *I.D.*, para. 72. Beyond this, the ALJ stated merely that "[t]here is no evidence to indicate that Mr. Tunis is anything more than a limited partner for Channel 5." *Id.* All of the other applicants filing exceptions have objected that the reason there was "no evidence" was that the ALJ refused, on the basis of relevance, to allow any inquiry into Tunis' role in Channel 5. Our review of the record confirms this impression. Specifically, the ALJ refused to

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Kaneshiro). Ka'Ikena asserts that it is impossible to determine the proper integration credit for Channel 5 without a full evaluation of the activities and participation of Tunis.

[4] By way of general legal background, we note the following. The Commission has described a typical limited partnership arrangement as "a business enterprise composed of (1) one or more general partners who exercise complete managerial control over the business' affairs and who are personally liable for the partnership debts; and (2) one or more limited partners who invest capital and share in the profits, but do not exercise any managerial control and do not incur any personal debts beyond their initial capital contributions." *Minority Ownership of Broadcasting*, 92 FCC 2d 849, 854 (1982). The Commission has compared a typical limited partner to a holder of debt or non-voting stock, conferring no influence or control over the license. *Ownership Attribution*, 58 RR 2d 604, 607 (1985). Because of the 'typical' limited partner's lack of influence or control, the Commission exempts such interests from consideration when applying its ownership rules, *id.*, and has indicated that they should be excluded in determining the integration credit an applicant is due, *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981). The exemption for limited partnership interests only applies, however, where the limited partner in fact lacks the power to control or influence the affairs of the licensee. *Ownership Attribution, supra*, 58 RR 2d at 613, 615-16. The limited partnership is, however, an extremely flexible vehicle, and legitimate limited partnership agreements may bestow upon limited partners powers which under the Commission's regulatory objectives would require that the limited partner be included as a principal in evaluating the applicant. *Id.* at 613-18. *See also WLOX Broadcasting, Co.* v. *FCC*, 260 F.2d 712 (D.C. Cir. 1958). And even if the limited partnership contained provisions adequately circumscribing a limited partner's role, the limited partner could act in contravention of those provisions in such a way as to require the inclusion of the limited partner in Commission evaluations. *Ownership Attribution, supra*, 58 RR 2d at 620, n. 67. Indeed, the Commission in implementing its policy of awarding minority preferences, recognized the potential of the limited partnership device for abuse. It therefore stated that it would review such agreements to ensure that control did indeed reside in the general partners. *Minority Ownership in Broadcasting, supra*, 92 FCC 2d at 855.

permit discovery into matters relating to Channel 5's limited partnership agreement. He even refused initially to require that the limited partnership agreement be produced, stating that it was not relevant to the designated issues, and he denied motions both to require that interrogatories relating to the limited partnership be answered or that documents relating to the agreement be produced. The ALJ did eventually order the production of Channel 5's limited partnership agreement, and it was exchanged by Channel 5 as part of its direct case.[5]

4. Furthermore, the ALJ refused requests that Channel 5 be required to present Tunis for questioning on his role in the partnership, again holding that the question was not relevant to the issues (Tr. 23-24). Dr. Dodd and Ms. Kaneshiro did testify, and counsel for the other applicants attempted to question them on their relationship with Tunis and how the Channel 5 partnership operated. The ALJ, however, foreclosed any inquiry into these areas on grounds of relevance. He refused to permit questions on the time and circumstances of the general partners' first meeting Tunis and each other (Tr. 374, 449, 464); when Tunis became a limited partner (Tr. 367); why the limited partnership form was chosen for the applicant (Tr. 375); how the partnership agreement was reached (Tr. 359); who selected legal and engineering counsel for the partnership (Tr. 335, 367-68, 399-400); who chose the applicant's transmitter site (Tr. 338-40); who selected the escrow agent for the partnership and who authorized that agent to disburse funds (Tr. 337-338, 477-79); and whether the general partners had delegated any of their duties to Tunis (Tr. 349, 363-64, 455). 455). Indeed, the ALJ stated that even if a general partner had delegated all of her duties to Tunis, it would not be relevant (Tr. 385).

5. These restrictive evidentiary rulings take on added significance in light of the exceptors' contentions that the Channel 5 partnership agreement itself contains provisions which allow Tunis to be more than a mere passive investor. Specifically, it is alleged, *inter alia*, that under the terms of the agreement: (a) neither general partner can voluntarily withdraw without obtain-

[5] *See Memorandum Opinion and Order*, FCC 83M-4584, released December 12, 1983, *Memorandum Opinion and Order*, FCC 84M-495, released January 30, 1984; *Memorandum Opinion and Order*, FCC 84M-962, released February 24, 1984; *Memorandum Opinion and Order*, FCC 84M-964, released February 24, 1984. The use of depositions was generally precluded, *see Memorandum Opinion and Order*, FCC 83M-4448, released December 1, 1983.

ing Tunis' prior consent; (b) neither general partner can sell her interests absent Tunis' consent; (c) Tunis must consent to the removal of a general partner or the admission of a new general partner; (d) Tunis together with one general partner may remove with "cause" the other general partner, although "cause" is not defined; (e) Tunis must consent to dissolution of the partnership and he alone may select the liquidating trustee. *See* TV-5 Br. at 5-6; Ka'Ikena Br. at 20-24; *Memorandum Opinion and Order*, FCC 84M-2218, released May 11, 1984, at para. 3; Tr. 1317-1318.[6] Considering these and other challenges to the Channel 5 partnership agreement raised by the parties, we believe the ALJ should have permitted full evidentiary exploration.

6. It appears that the ALJ's basic position was that the sole standard for evaluating a limited partnership was the validity of the limited partnership agreement under the Uniform Limited Partnership Act of 1976, *see I.D.* para. 72. The ALJ cited in support of his conclusions the Commission's original Report and Order in the *Ownership Attribution* proceeding, 97 FCC 2d 997 (1984). There, the Commission concluded that conformance with the Uniform Limited Partnership Act provided adequate assurance that a limited partner was adequately isolated from managerial influence, 97 FCC 2d at 1022-23. In fairness to the ALJ, it was not until well after the hearing in this proceeding was concluded that the Board handed down its opinion in *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *modified*, FCC 85-512, released September 24, 1985, in which we emphasized the importance of making a full record examination to determine if the proposal is a *bona fide* business arrangement. *See* FCC 85-512, *supra*, at para. 9. And it was not until after the issuance of the *I.D.* that the Commission released its order on reconsideration in the *Ownership Attribution* proceeding, abandoning reliance on conformance with the Uniform Limited Partnership Act and discussing at length the importance of a limited partner's being insulated from participating in the operations of the partnership. *Ownership Attribution*, 58 RR 2d 604 (1985). The ALJ's approach here, however, has precluded the development of an adequate record upon which to base a determination of the true nature of the Channel 5 partnership. And the exceptors raised sufficient questions before the ALJ to establish a *prima facie* basis for a full

[6] The provision pertaining to removal of the general partner has been amended once by Channel 5, and on August 5, 1985, it submitted a petition for leave to amend which seeks to further modify this provision. In view of our decision to remand, we will dismiss this petition with leave to refile it with the ALJ.

inquiry. *See Houston Family Television, Ltd.*, 58 RR 2d 1557, 1564-65 (Rev. Bd. 1985). *Cf. Chester Associates*, FCC 85R-71, released August 28, 1985, paras. 3, 4, and n. 17. Channel 5's integration proposal therefore cannot be properly evaluated at this time. We are consequently remanding this proceeding so that these matters may be fully explored.

7. ACCORDINGLY, IT IS ORDERED, That the Petitions for Leave to Amend filed on April 26, 1985, June 6, 1985, July 1, 1985, and October 21, 1985, by Healthy's Natural Foods, Inc. d/b/a/ TV 5 of Honolulu (formerly Down to Earth, Inc. d/b/a TV 5 of Honolulu) ARE GRANTED, and the amendments ARE ACCEPTED; and

8. IT IS FURTHER ORDERED, That the application of Media Central, Inc. (KHAI-TV) (File No. BPCT-830223KL) IS DISMISSED; and

9. IT IS FURTHER ORDERED, That the Petition for Leave to Amend and the Motion to Strike, both filed by Channel 5 Broadcasting Associates on August 5, 1985, ARE DISMISSED, and

10. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for further hearing in accordance with this opinion and for the preparation of such Supplemental Initial Decision as may be warranted by a supplemental record.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 85D-13

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

Family Media, Inc. Honolulu, Hawaii	MM Docket No. 83-727 File No. BPCT-830110KE
Channel 5 Broadcasting Associates Honolulu, Hawaii	MM Docket No. 83-728 File No. BPCT-830223KF
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Media Central, Inc. (KHAI-TV) Honolulu, Hawaii	MM Docket No. 83-732 File No. BPCT-830223KL
Down To Earth, Inc. d/b/a TV 5 of Honolulu Honolulu, Hawaii	MM Docket No. 83-733 File No. BPCT-830223KM

For Construction Permit for a New TV Station

Appearances

Aaron Shanis on behalf of Family Media, Inc.; *Forbes W. Blair* and *William D. Silva* on behalf of Channel 5 Broadcasting Associates; *Lisa Sullivan Gallant* and *Ramsey L. Woodworth* on behalf of Polynesian Services Corporation; *Robyn G. Nietert* and *Richard L. Brown* on behalf of Ka'lkena Lani TV Corporation; *Marie T. Riordan* and *Seymour M. Chase* on behalf of Media Central, Inc.; *Russell Balch* on behalf of Down To Earth, Inc. d/b/a TV 5 of Honolulu; and *Brian Kilbane* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: February 28, 1985; Released: March 7, 1985

Preliminary Statement

1. This proceeding involves mutually exclusive applications for authority to construct a new television station to operate on Channel 5 in Honolulu, Hawaii. The remaining applicants are: Family Media, Inc. ("FMI"); Channel 5 Broadcasting Associates ("Channel 5"); Polynesian Services Corporation ("Polynesian"); Ka'lkena Lani TV Corporation ("Ka'lkena"); Media Central, Inc. ("MCI"); and Down To Earth, Inc. d/b/a TV 5 of Honolulu ("DTE").

2. Prior to the commencement of the hearing, Abell Communications Corporation, Pacific Rim Broadcasting Co. (KPRR-TV), Frederick B. Livingston, and Hana Hou Communications Corp. withdrew their applications.

3. The *Hearing Designation Order* (MM 5330), released on July 19, 1983, specified:

> 1. To determine, with respect to all of the applicants except Pacific Rim Broadcasting Co. (KPRR-TV), whether the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 2. To determine:
>
> (a) the legal corporate boundaries of the city of Honolulu, Hawaii;
>
> (b) whether each of the applicants would encompass the entire city of Honolulu within its predicted city grade contour as required by Section

73.685 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the rules.[1]

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

4. A prehearing conference was held on September 28, 1984. Hearing sessions were held on March 13, 14, 15, 19, 20, 21, and 22, 1984.

5. The parties submitted their proposed findings of fact and conclusions of law on June 15, 1984 and their reply findings on July 6, 1984.

Findings of Fact

Air Hazard Issue

6. A summary decision under the air hazard issue has been granted to the following applicants: DTE (FCC 83M-4604, released December 12, 1983); Ka'lkena (FCC 84M-130, released January 12, 1984); Channel 5 (FCC 84M-474, released January 27, 1984); and FMI (Tr. 22 and 23). The remaining applicants, Polynesian and MCI, have both received a determination of no hazard from the Federal Aviation Administration: See Polynesian Ex.'s 5 and 16 and MCI Ex. 4.

City-Grade Coverage Issue

7. The only governmental entities in the State of Hawaii are its five counties since there are no communities or places with organized municipal governments. The geographical boundaries of the City of Honolulu are coextensive with the county of Honolulu; that is, the people of the city and county of Honolulu constitute a single body politic incorporated under the name "City and County of Honolulu" pursuant to the Articles of Incorporation of their revised charter approved on November 7, 1972. The coextensive City and County of Honolulu is comprised of the entire Island of Oahu and all other islands in the State of Hawaii which are not included within any other county in the State. The other islands

[1] Section 73.685(a) of the Commission's Rules requires that a VHF television station pace a 74 dBu signal (city grade) contour over its entire principal community. The Designation Order explained that the Section 73.685 issue was specified because the Commission's staff was unable to determine the legal boundaries of Honolulu from the applicants' submissions.

include certain largely uninhabited islands extending approximately 1,400-1,500 miles westward from the Island of Oahu to Kure Island. Since the city of Honolulu is coextensive with the county of Honolulu, it is not recognized for census purposes in the 1980 U.S. Census Report for Hawaii. Instead, the Census Report employed a Honolulu census designated place (CDP) which essentially represents the Honolulu Judicial District (Polynesian Ex. 15, pp. 1-5; FMI Ex. 8, pp. 1-2, 6-8, DTE Ex. 8).

8. Due to its 1,500 mile spread, none of the applicants will provide a city grade signal (74 dBu), to the entire coextensive City and County of Honolulu. With the exception of Polynesian's total city grade coverage of the island, none of the remaining applicants proposes a city grade signal that will encompass the entire Island of Oahu. However, in addition to Polynesian, Channel 5 will also provide a city grade service to the entire Honolulu urbanized area as defined in the 1980 Census. Moreover, each of the other applicants will provide city grade service to all but a very miniscule portion of that Honolulu area. With the exception of Polynesian's greater predicted coverage, each of the applicants proposes city coverage that is essentially the same as that provided by existing VHF stations licensed to Honolulu (Polynesian Ex. 15; FMI Ex. 8; DTE Ex. 9 and Ex. 10; Channel 5 Ex. 4; MCI Ex. 5; Ka'lkena Ex. 9).

Standard Comparative Issue

Description of the Applicants

9. *Family Media, Inc.* FMI has been incorporated under the laws of the State of Hawaii. It has issued 1,961 shares of stock — 1,000 shares to Linda E. Borgia and 961 shares to Lorraine M. Bachran. Borgia serves as President, Treasurer and Director; Bachran serves as Secretary and Director; Victor Borgia a non-stockholder is the Vice President (FMI Ex. 1).

10. FMI was originally incorporated in September 1982, all of the stock being issued to Victor Borgia who also was designated President, Secretary and a Director. Linda Borgia was Vice President (Channel 5 C Ex. 5, p. 9; Tr. 155 & 156). Subsequently, Victor Borgia resigned as Director and President and Linda Borgia acquired 100% of the FMI stock (Tr. 158 & 159).

11. On April 26, 1983, Linda E. Borgia signed a stock and purchase agreement with Lorraine M. Bachran. By the terms of that agreement, Linda E. Borgia agreed to sell to Lorraine M.

Bachran and Mrs. Bachran agreed to buy from Mrs. Borgia 49% of all common stock issued or to be issued to Mrs. Borgia by Family Media, Inc. On the same day, the shareholders of the corporation agreed to increase the authorized capital stock of Family Media, Inc. from 1,000 to 10,000 shares of common stock at $1.00 per value and authorize the officer of the corporation to file with the State of Hawaii all documents necessary to increase the authorized capital stock. On that same day, the Board of Directors of Family Media, Inc. agreed to the issuance of 961 additional shares of common stock at $1.00 par value, and that those shares, pursuant to the Article of Incorporation of Family Media, Inc., be first offered at par value to Linda E. Borgia, as shareholder of the corporation. Also on April 26, 1983, the shareholders of Family Media, Inc. voted to increase the number of directors of the corporation, and to elect Lorraine M. Bachran as a director (FMI Ex. 9). On April 29, 1983, FMI's application was amended to report that Lorraine M. Bachran became a 49% owner (Tr. 169 & 258).

12. On June 24, 1983, the corporation filed its Certificate re Increase of authorized capital stock with the Hawaii Department of Commerce and Consumer Affairs. That certificate increased the authorized capital stock of the corporation from 1,000 to 10,000 shares of $1.00 par value common stock. On that same day, the corporation issued stock certificate No. 3 to Linda E. Borgia for 961 shares of $1.00 par value common stock and, at Linda E. Borgia's request, accept the return of stock certificate No. 3 and issues in its place stock certificate No. 4 to Lorraine M. Bachran for 961 shares of $1.00 par value common stock, representing the transfer from Mrs. Borgia to Ms. Bachran of those shares (FMI Ex. 9).

13. *Channel 5 Broadcasting Associates.* Channel 5 is a limited partnership organized under the Uniform Limited Partnership Act of the State of Hawaii. The limited partnership consists of two general partners: Dr. Carol Santoki Dodd and Ms. Mildred Tina Kaneshiro. The limited partner is Phillip Tunis, a resident of Rye Brook, New York. The general partners will exercise complete control over the management and operations of the television station (Channel 5 Ex. 1).

14. *Polynesian Services Corporation.* Polynesian is a corporation organized under the laws of Hawaii. It is authorized to issue 1,000 shares of common stock at $50.00 par value. The offices, directors and stockholders of Polynesian and their respective interests are (Polynesian Ex. 1, Tr. 781–82):

Names	*Number of Shares*	*% of Ownership*
Frank F. Fasi, Director, President, Secretary, Treasurer	3	15%
Bob McAlester, Director, Vice President	3	15%
Richard C. H. Chung, Director	3	15%
Kurt Laubscher, Director[2]	3	15%
Ransom A. K. Piltz, Director	3	15%
Barry Chung, Director	2	10%
Joyce Miyeku Kono Fasi, Director	2	10%
Connie K. McCracken, Director[3]	1	5%

15. *Ka'lkena Lani TV Corporation.* Ka'lkena was incorporated under the laws of the State of Hawaii. It is authorized to issue 1,000 shares of stock. The following individuals who hold the following offices and directorships have subscribed to stock in the following percentages (Ka'lkena Ex. 1; Tr. 1079):

Name	*Position*	*Shares*	*% of Ownership*
Cynthia Anne Char	Director	130	13%
Bryan Holmes	Director	175	17.5%
Lee M. Holmes	Director/President	175	17.5%
Ernie A. Galito	Director/Secretary	130	13%
Henry Osborne	Director/Vice President	130	13%
Karen Kanakanui	Director	130	13%
Richard Kanakanui	Director	130	13%

16. *Media Central, Inc.* MCI is a corporation organized under the laws of the State of Delaware. The current officers, directors and stockholders of MCI are as follows:

Name	*Position and Ownership*
Morton J. Kent	President, Chairman and 20.8% stockholder
Harold L. Green	Executive Vice President
H. Bernard Dixon	Director and 6.8% stockholder
Thomas M. Hudson	Director and 2.6% stockholder

[2] Kurt Laubscher died on August 8, 1984. By amendment filed January 22, 1985, Bertha Laubscher, Kurt Laubscher's widow has become the owner of his 3 shares.

[3] Connie K. McCracken became a stockholder after the "B" cut-off date. (Tr. 117).

L. M. Climber	Director
Donald B. Kent	Secretary, Treasurer, and Director
Forrest L. Preston	Director and 7.8% stockholder
David J. Kent	Director
Stephen D. Kent	Director
John F. McMullan	7.8% stockholder
David R. Vaughn	7.8% stockholder
Charles J. Mullinax	2.6% stockholder
Kenneth H. Rayborn	2.6% stockholder
Harley G. Hunter	1.3% stockholder
Mary Ellen Moore	1.3% stockholder
Janice H. Thornton	1.3% stockholder
H. Bernard Dixon, Custodian for Candace Starr Dixon	0.5% stockholder
H. Bernard Dixon, Custodian for Vanessa Starr Dixon	0.5% stockholder
Kent Rentals, Inc.	36.4% stockholder

17. On April 29, 1983, the "B" cut-off date in this proceeding, the stockholders held the following percentages of stock:

Names	*% of Ownership*
Morton J. Kent	57.1%
H. Bernard Dixon	7.8%
David R. Vaughn	7.8%
Forrest L. Preston	7.8%
John F. McMullan	7.8%
Harley G. Hunter	1.3%
Janice H. Thornton	1.3%
James D. Moore	1.3%
Thomas M. Hudson	2.6%
Kenneth H. Rayborn	2.6%
Charles J. Mullinax	2.6%

18. MCI is the permittee of commercial stations, KHAI-TV, Honolulu, Hawaii, now operating on Channel 20. The station commenced operation on December 30, 1983, and an application for a license to cover the construction permit was filed on January 31, 1984. The application in this proceeding is for a modification of the construction permit to authorize a change to Channel 5 and

related changes to the facilities of the station.

19. Steps are being undertaken by the applicant, which, when completed, will change the ownership of this applicant to the extent of 49%. In the process of formation are (1) a new limited partnership, named Honolulu Family Television, Ltd. Partnership, in which MCI will be the sole general partner, with a 51% interest, and (2) a second limited partnership, named Honolulu TV 20, Ltd. Limited Partnership, which will be the limited partner, with a 49% interest, and Honolulu Family Television, Ltd. Partnership (MCI Ex. 1).

20. *Down To Earth, Inc. d/b/a TV 5 of Honolulu.* DTE is a Hawaii corporation with 4.210 shares of common voting stock issues and outstanding. The officers, directors and stockholders of DTE are as listed below:

Name	*Office*	*Director*	*% of Ownership*
Catherine J. Hoshijo	Vice President	Yes	59%
Lawrence J. Olsen	President, Secretary	Yes	19%
Patrick Bishop	—	No	15%
Christina J. Stuart	Treasurer	Yes	7%
Timothy S. Anthony	Vice President	No	0%
Robert L. Lent	Vice President	No	0%
Gregory D. Johnson	Vice President	No	0%

Diversification of Mass Media

21. *Family Media, Inc.* Neither FMI nor any of its officers, directors or stockholders have any ownership interest in, or control of, any medium of mass communication (FMI Ex. 2).

22. *Channel 5 Broadcasting Associates.* None of the general or limited partners in Channel 5 has ever had any interest in any radio or television station, cable systems, newspaper, or other medium of mass communication (Channel 5 Ex. 1).

23. *Polynesian Services Corporation.* Neither Polynesian or any of its shareholders, officers, or directors have any interest in any radio or television station or other means of mass communication (Polynesian Ex. 3).

24. *Ka'lkena Lani TV Corporation.* Guam Cable TV owns and operates a cable television system serving various communications on Guam. The principals of the applicant own the following percentages of Guam Cable TV (Tr. 996):

Name	*Share*
Lee M. Holmes	1

25. 99.99 percent of Guam Cable TV is owned by Western Systems, Inc. Principals of the applicant own the following percentage of Western Systems, Inc., of which FM facility KOKU on Guam is a wholly-owned subsidiary (Ka'lkena Ex. 4):

Name	*Share*
Lee M. Holmes	4% (46,973 shares)
Bryan L. Holmes	3% (36, 272 shares)

26. Northern Marianas Cable TV Corp. owns and operates a cable television system serving the Island of Rota and Saipan. Principals of the applicant own the following percentages of Northern Marianas Cable TV Corp (Ka'lkena Exs. 4 and 5):

Name	*Share*
Lee M. Holmes	4% (321.2 shares)
Bryan L. Holmes	1.9% (150 shares)

27. Joan S. Holmes, wife of Lee M. Holmes and mother of Bryan L. Holmes, owns 44.22% of Western Systems, Inc. Joan Holmes is a member of the Board of Directors of Western Systems, Inc. She is a member of the Board of Northern Marianas Cable TV Corp (Tr. 1071, 1072).

28. Mr. Galito does not own any other mass media facilities. He has a standard employee option to purchase shares in Western Systems, amounting to 1,500 shares per year. Western Systems currently has outstanding approximately 1.2 million shares (Tr. 1162, 1163).

29. The construction permit for the Guam Radio Services Facilities was granted October 31, 1983. Western Systems, Inc. has pending two applications for multiple MDS Channels, to be decided by lottery. They are currently categorized as Common Carrier Facilities. There are four locations in Guam and San Jose, California (Tr. 1006, 1009).

30. *Media Central, Inc.* The interest of MCI and its principals in broadcast stations and in applications pending before the Commission are as follows (MCI Ex. 4):

Media Central is:

1. The permittee of commercial television station KHAI-TV, Honolulu Hawaii. The station commenced operation on December 30, 1983, and an application for a license was filed on January 31, 1984.

2. A 22% general partner in Canton 67, Ltd., a limited partnership, which is the licensee of television broadcast station WOAC, Canton, Ohio.

3. A 60% general partner in Choice Channel 62 Partnership, permittee of a new commercial television station (KEKR-TV) at Kansas City, Missouri. An application for a license was filed on February 24, 1984.

4. A 45% general partner (with an option to require an additional 10%) in community service broadcasting, permittee of a new commercial television station at Huntsville, Alabama.

5. A 34% voting stockholder in Cape Girardeau Family Television, Inc., licensee of commercial television station KBSI, Cape Girardeau, Missouri. MCI also has an option to acquire an additional 26% of the stock of the licensee corporation, and upon giving notice of its intent to exercise the option, filed an application for Commission consent to a transfer of control of the licensee.

Morton J. Kent:
A 33% general partner in Canton 67, Ltd., above.

H. Bernard Dixon is:

1. A 2.59% limited partner in Canton 67, Ltd., above.

2. Vice President, Secretary, Treasurer and 10% stockholder (with an option to purchase the remaining 90%), in Jackson Family Television, Inc., permittee of a new commercial television station at Jackson, Mississippi.

3. President, a Director and 23.7% stockholder in Knoxville Family Television, Inc., permittee of the new commercial television station (WKCH-TV) at Knoxville, Tennessee.

Forrest L. Preston is:

1. A 25% general partner in Portland Television Associates, Ltd., an applicant for a construction permit for a new commercial television station on Channel 40 at Portland, Oregon.

2. A 20% limited partner in Bellingham Television Associates, Ltd., an applicant for a construction permit for a new commercial television station on Channel 64 at Bellingham, Washington.

3. A 28% limited partner in Caldwell Television Association, an applicant for a new commercial television station on Channel 9 at Caldwell, Idaho.

Stephen D. Kent is:
President, a Director and 50% stockholder in Columbus Family Television, Inc., the licensee of television station WXTX, Columbus, Georgia.

David R. Vaughn is:

1. 1.29% general partner of an a 33-1/3% general partner in B.B.D., Ltd., which holds a 1.29% limited partnership interest in Canton 67, Ltd., above.

2. A 20% general partner in Appleton Midwestern Television, permittee of a new commercial television station on Channel 32 at Appleton, Wisconsin.

3. A 50% general partner in Waco Community Media, Ltd., the 15% stockholder in Focus Broadcasting of Waco, Inc., permittee of a new television station on Channel 44 at Waco, Texas.

4. A 28% limited partner in Thornbury Television, Ltd., permittee of a new commercial television station on Channel 18 at Wichita Falls, Kansas.

5. A 50% general partner in Pueblo Family Television, a limited partnership which is an applicant for a construction permit for a new commercial television station on Channel 32 at Pueblo, California.

6. A 20% limited partner in Orlando Family Television, Ltd., an applicant for a construction permit for a new commercial television station on Channel 65 at Orlando, Florida.

Kenneth H. Rayborn is:
A 15% limited partner in Canton 67, Ltd., above.

Harley G. Hunter is:
A 50% general partner in Pueblo Family Television, Ltd., above.

31. *Down To Earth.* Ms. Hoshijo is a 50% stockholder in Aloha Channel 14, Inc. Her husband, Lawrence Olsen, is a 10% stockholder (Tr. 569). In January 1982, Aloha Channel 14 requested the dismissal of its pending application for Channel 14 in Hónolulu (Tr. 569). One of the conditions of the dismissal was that for a period of 6 years Aloha Channel 14 would produce four 13-week segments of programming for Pacific Rim, the permittee of Channel 14 (Tr. 570). No amendment to the DTE application was filed prior to the "B" cut-off date to indicate that Ms. Hoshijo intended to divest her stock in Aloha Channel 14 if the DTE application were granted (Tr. 576).

32. Mr. Olsen indicated that he would not exercise the right Aloha Channel 14 has to programming on Channel 14 in Honolulu. However, he did not know the other stockholders in Aloha Channel 14, nor did he know if their consent was necessary in order to prevent Aloha Channel 14 from fulfilling its commitment to provide programming to Pacific Rim.

33. Ms. Hoshijo is a member of the governing board of the Self-Sufficiency Association which currently has pending a new low power television station application in Austin, Texas (Tr. 584).

34. DTE owns Summit Productions, a video production company (DTE Ex. 4 p. 2). Summit Productions is a full service production company including full audio and video productions (both 3/4 inch and 1 inch), post-production, graphics, layout and typesetting. Summit Productions is the largest independent

production company in Hawaii. It produces political ads, commercials, and two television series: "Kathy's Kitchen," distributed nationally on the PBS Satellite System, and "Chris Butler Speaks", a lecture series to be aired on PBS. Summit Productions also provides footage for local and international news services (DTE Ex. 5 pp. 3-4).

Integration of Ownership with Management

35. *Family Media, Inc.*. As general manager, Ms. Borgia will work at the station forty hours per week or more. For the past eleven years, she has been a resident of Oahu, Hawaii and has resided at her current address for the past five years, she is a citizen of the United States and she is female. She is a college graduate and is a certified Pre-school teacher (FMI Ex. 3 p. 1). Ms. Borgia is a member of the Broadcast Commission of the Hawaii Council of Churches; a board member of the Christian Academy; a director of Ronald McDonald Home; a secretary and founder of "Living Foods Discount Mart, Inc.", a non-profit organization whose purpose is to raise funds to support a crisis center which feeds, clothes, and houses the needy and destitute in Hawaii; founding staff member and active participant of the Blessing Thrift Shop and is a active participant of the Operation Blessing Luau which is an annual fund raiser to assist the poor of the Hawaii area (FMI Ex. 3 p. 2).

36. Ms. Lorraine M. Bachran is proposed as program director and intends to work at least forty hours per week. She was born and raised in the State of Hawaii and is a life long resident of the Island of Oahu. Ms. Bachran is an oriental female American. She attended the College of New Rochelle, New Rochelle, New York in 1946 thru 1949. Her civic activities include the following: volunteer for Oahu Correction Facility for Girls; Committee Member for Kaneohe Business Group; Chairman of Christian Womens Club; Member of Religious Broadcast Commission; Vice President and Founder of Living Foods Discount Mart; Staff member of Ronald McDonald House and volunteer worker for March of Dimes, Cancer Society and Heart Association (FMI Ex. 4 p. 2).

37. *Channel 5 Broadcasting Associates*. Dr. Carol Santoki Dodd will serve as general manager. She is a resident of Honolulu and is of Japanese descent. Dr. Dodd received a M.Ed. Degree in Counseling from the College of William and Mary, Williamsburg, Virginia in 1960. In 1980, she received a Doctor of Education Degree from the University of Hawaii's College of Education

(Channel 5 Ex. 1). Dr. Dodd has held various professional positions and from 1981 to the present she has worked on contract in the public information office, Hawaii State Judiciary. She has been designated recently as Director of Public Information for the Hawaii State Judiciary.

38. Dr. Dodd's major volunteer community activities include the following: from 1962 an active member and former officer of the Hawaii Legal Auxiliary (the adjunct group of the Hawaii State Bar Association); a legislative chairman of the League of Women Voters 1974-1975; since 1970 a member of the Junior League of Honolulu, an organization which trains women to be community volunteers; since 1975 an active member and former officer of the John Howard Association, an organization dedicated to crime prevention and rehabilitation of ex-offenders; an active participant since 1982 in the Aloha United Way, the local counterpart of the United Way of America; since 1975 a member of the Hawaii State Judiciary's Ali'iolani Hale Restoration Advisory Committee whose function is to secure public and legislative support for the restoration of the historic Supreme Court Building; since 1981 a member of the Hawaii State Judiciary's Committee on Emerging Issues for the Courts; since 1981 a member of the Board of Crime Stoppers, Inc.; since 1983 a Vice President of the Copy Olani Childrens Medical Center — Sex Abuse Treatment Center; and recently as a board member of Inter Arts Council of the University of Hawaii Foundation and a board member of the Neighborhood Justice Center (Channel 5 Ex. 2).

39. Mildred Tina Kaneshiro will devote a minimum of forty hours per week as general sales manager and public affairs director. She is a resident of Honolulu and is of Philipino and Hawaiian descent. From 1968 to 1980 Mrs. Kaneshiro worked at Station KIKU-TV in Honolulu as office manager, traffic director and account executive specializing in difficult accounts. From 1966 to 1968 Mrs. Kaneshiro was employed at Radio Station KHVH Honolulu as traffic director and sales secretary. Her participation in civic endeavors consists of the following: since 1974 active member and past president of the American Business Womens Association, Punahele Chapter Honolulu; since 1976 an active member of the Hui Makaala Womens Group; a member of the Kona Kao Club of Honolulu from 1970 to the present; from 1978 to 1980 board member and fashion show coordinator of the Cystic Fibrosis Organization; since 1979 an active participant in Aloha Week; since 1978 Mrs. Kaneshiro has been associated with various beauty pageants. She has also been a volunteer for the

March of Dimes Telethon, the Muscular Dystrophy Telethon and the Cystic Fibrosis Telethon (Channel 5 Ex. 3).

40. *Polynesian Services Corporation.* All of Polynesian's principals will work full-time at the proposed station (Polynesian Ex. 2).

41. Frank F. Fasi will serve as the general manager and chief executive officer. He is a resident of Honolulu, Hawaii, is a college graduate and has his own business, the Frank F. Fasi Supply Company (Polynesian Ex. 6, Tr. 829). Mr. Fasi has made arrangements for someone to fill his position in this company should Polynesian be granted a construction permit (Tr. 829). Mr. Fasi has been active in civic endeavors during the forty years of his residence in Hawaii. He has been a member of the Rotary, the Boy Scouts, the Lions Club, the Navy League, the American Legion and Veterans of Foreign Wars. In 1950 Mr. Fasi was elected Hawaii's Department Commander of the Veterans of Foreign Wars. In 1957 he served as President of the Kalihi Business Association (Tr. 797). From 1952 to 1956 Mr. Fasi served as the Democratic National Committeeman in Hawaii (Polynesian Ex. 6). In 1958 he was elected Senator to Hawaii's Legislature. In 1964 he was elected as an at-large councilman of Honolulu, a position which he held until 1969 (Polynesian Ex. 6). In November 1968 Mr. Fasi was elected Mayor of Honolulu, he was re-elected in 1972 and in 1976 (Tr. 776-77). At the time of the hearing, Mr. Fasi was a candidate for election as Mayor of Honolulu for a term to end in January 1989 (Tr. 819). Mr. Fasi indicated that should he be elected he will temporarily resign his position as general manager of the station (Tr. 830) and the Polynesian Board of Directors will determine who will serve as general manager during Mr. Fasi's Mayoral Term (Tr. 801-19). Mr. Fasi proposes to put all of his stock in Polynesian in a blind trust (Tr. 802, 830).

42. Bob McAlester is proposed to serve as station manager and chief engineer. He has been a resident of Honolulu since 1975. Mr. McAlester has been employed in the broadcast industry since 1961. He has worked as a disc jockey, program director, promotions and public affairs director, general sales manager and chief engineer. In 1975 he served as general manager of KORL, Honolulu and in 1978 as general manager for KAHU/KULA(FM), and in 1979 for KKUA/KQMQ-FM (Polynesian Ex. 7). In 1980 Mr. McAlester established his own advertising company. His wife holds a 25% interest and is Vice President of the company (Tr. 905, 906). Should Polynesian receive a grant herein Mr. McAlester would divest himself from the company (Tr. 906, 923). Mr.

McAlester is also the holder of a general radio telephone operators license (Polynesian Ex. 2; Ex. 7 and Tr. 901). Since he has lived in Honolulu, he has, on annual basis, assisted the Hawaii State Veterinary Association by organizing, scheduling and buying air time to promote free clinical veterinary services and has actively worked with the Hawaii Jaycees to raise funds for Hawaii's Silver Jubilee Celebration (Polynesian Ex. 7, Tr. 903, 920).

43. Richard C. H. Chung is proposed to be the financial officer and will have responsibility for financial and accounting affairs including the long range planning of the station's financial affairs, corporate investment, financial forecast and cash flow management (Polynesian Ex. 2, Ex. 13). Mr. Chung is of Korean descent and is a life long resident of Honolulu. Mr. Chung is self-employed running a number of businesses, none of which should interfere with his commitment to the proposed station (Polynesian Ex. 13, Tr. 958-959). Mr. Chung has been an active member of the National Guard Reserve for thirty-six years. He is also a member of the Japanese Civic Club, an organization which sponsors scholarships and other activities for ethnic youths. He served on the board of this organization from 172–1977 (Polynesian Ex. 13).

44. Kurt Laubscher, now deceased, had been proposed as the stations public affairs/community projects coordinator. Mr. Laubscher's family moved to Honolulu when he was fourteen years of age. After high school and military service Mr. Laubscher spent approximately sixteen years working in the Las Vegas area. In 1977 he and his wife returned to Honolulu (Polynesian Ex. 10). Since his return to Hawaii in 1977 Mr. Laubscher had been involved in a number of civic organizations notably the Honolulu Chamber of Commerce, Kailua Chamber of Commerce, the Small Business Association, the Honolulu Board of Realtors and the Hawaiian Association of Realtors, the Honolulu Chapter of the National Federation of Independent Business and the U.S. Navy League (Polynesian Ex. 10). Mr. Laubscher also served as the Republican Party precinct president from Kailua and he is also on the platform committee of the State Convention (Tr. 950–951).

45. Bertha Laubscher will be substituted for Kurt Laubscher. She is Hawaiian born and of Japanese ancestry.[4]

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[4] Substitution of principals in an applicant's integration proposal is permitted upon death of an integrated principal. See *Golden State* Broadcasting Corp., 55 RR 2d 348 (Rev. Bd. 1983).

46. Mr. Ransom A. K. Piltz, is the proposed program director (Polynesian Ex. 2). Mr. Piltz has lived in Hawaii twenty-eight years and plans to move to Honolulu should the Polynesian application be granted (Polynesian Ex. 8, Tr. 875). Both of Mr. Piltz's parents and three of his grandparents were born in Hawaii and all are of Hawaiian and or Chinese ancestry. Mr. Piltz owns 60% of the family business, Piltz Electric (Polynesian Ex. 8). In the event of a grant, Mr. Piltz will hire a business manager to step in and take full-time responsibility for Piltz Electric (Tr. 889). Mr. Piltz's civic participation includes the following: member of the Hawaiian Civic Club; Kahului Rotary for six years, Maui Contractors Association for ten years and Pacific Electric Contractors Association. He is also the past member, director and President of the construction industry legislative organization in Honolulu (Polynesian Ex. 8). He ran for public office for the State of Hawaii in 1982 (Tr. 884–885).

47. Barry Chung is the proposed sales manager (Polynesian Ex. 12). He is a life long resident of Honolulu and is of Chinese descent (Deposition of Barry Chung page 4-5). Mr. Chung is a graduate lawyer admitted to the bars of Louisiana and Hawaii. He is engaged in the private practice of law to limited extent and is primarily involved in land investments on behalf of various joint ventures and partnerships and with members of his family (Polynesian Ex. 12). In the event of a grant, Mr. Chung intends to withdraw from these activities in order to make the Polynesian venture succeed (Barry Chung Deposition at 22). Since 1971, Mr. Chung has served as director of the Boys Club of Honolulu. He is also member and secretary of the Honolulu Housing Foundation which provides housing for low and moderate income families. Mr. Chung serves as legal counsel for the nonprofit corporation of Hawaii Portable Computers Users Association (Barry Chung Deposition at 13-16).

48. Joyce Miyeku Fasi is proposed to serve as the station's full-time ethnic and special programming director within the program department (Polynesian Ex. 2). She will also be responsible for implementation and administration of the station's EEO program (Tr. 858–869). She is of Japanese ancestry and life long resident of Honolulu. She was awarded the Bachelor of Science Degree from the University of Hawaii in 1958. Mrs. Fasi has devoted much time to civic activities of Honolulu. She has been active in Philipino, Japanese, Chinese and Samoan Womens Groups (Tr. 837). She has served as a member of the board of directors of the following groups: The Young Womens Christian

Association; The YWCA Beach Club; The Womens Bowling Club; The Womens Golf Club; Lincoln Elementary School Parent Teacher Association (President 1977-1978); Christian Womens Club (Chairman, 1981-1982); Blessings Incorporated and Blessings Thrift Shop (a non-denominational christian outreach); American Federation of Business and Professional Womens Club; Fellowship of Christian Athletes; Good News Fellowship; Campus Crusade; and American Mothers, Inc. (Polynesian Ex. 9, Tr. 849-852). Mrs. Fasi has also chaired fund raisers for the following organizations: Long Association, Muscular Dystrophy Telethon, Heart Association, American Diabetes Association, and Big Brothers and Big Sisters Association (Polynesian Ex. 9, Tr. 853).

49. Connie McCracken will serve as the proposed stations business manager. She will have management responsibilities for the day-to-day operation of business affairs of the station and will oversee the administration of the office staff (Polynesian Ex. 2).

50. *Ka'lkena Lani TV Corporation.* Lee M. Holmes is the proposed full-time general manager (Ka'lkena Ex. 5 p. 2). He has never resided in Honolulu, but plans to move there in the event his application is granted. (Id.; Tr. 1036). Mr. Holmes, a retired Colonel in the Marine Corps., moved to Guam in 1972 where he acquired a 70% interest in the local cable television system (Ka'lkena Ex. 5 Tr. 1017). The cable system is owned by Guam Cable TV which is a subsidiary of Western Systems, Inc. which holds a construction permit for a new FM station (Ka'lkena Ex. 1). Mr. Holmes is Chairman of the Board, President and Treasurer of Western Systems, Inc., of Guam Cable TV and of Guam Radio Services, Inc. (Tr. 994, 1000).

51. Richard Kanakanui is proposed to work full-time as business manager and community relations director (Ka'lkena Ex. 7). Mr. Kanakanui was born in Honolulu, Hawaii in 1929 where he resided until 1964. He is a resident of Beckley, West Virginia and a self-employed architect (Ka'lkena Ex. 7). Mr. Kanakanui's father was Hawaiian and his mother Caucasian (Tr. 1085). He has been recognized as a minority group member by the State of West Virginia (Tr. 1087). He plans to abandon his career as an architect in the event Ka'lkena receives a construction permit (Tr. 1095).

52. Cynthia Char, a chinese female is the proposed full-time director of public service broadcasting and childrens programming. A resident of New York, Ms. Char will return to her native Honolulu should the license be granted to Ka'lkena (Ka'lkena Ex. 2). Ms. Char lived in Honolulu from 1962 until 1973 (Ka'lkena Ex. 2). She received a BA degree from Swarthmore College, a Masters

of Education from Harvard Graduate School of Education and is currently pursuing a Doctorate in Education from Harvard (*Id*). Ms. Char has been involved as a researcher and educational consultant for childrens' radio and television programs and has written several papers on these subjects (Ka'lkena Ex. 2).

53. Ernie A. Galito is the proposed full-time sales manager. Presently a resident of Guam he will relocate to Honolulu should a construction permit be granted (Ka'lkena Ex. 3). Mr. Galito's father was Philipino and his mother was Caucasian. He is a graduate of the University of Mississippi. From 1974 to 1975 he was employed at Stockville TV Cable, Stockville, Mississippi as a field technician (Ka'lkena Ex. 3). In 1976 he joined Guam Cable TV as assistant cablecasting manager (Tr. 1134). From 1976 to 1979 he was general manager of Saipan Cable TV on Saipan (Tr. 1135). In 1980, Mr. Galito returned to Guam Cable TV as marketing manager. At Saipan Cable TV, Mr. Galito produced an original weekly half hour news program (Tr. 1141, 1145). He also produced over 50 local short cultural features. He also produced the coverage of status negotiations talks between the Micro-Nesian governments and the U.S. Ambassador for the trust territories (Tr. 1146).

54. Bryan Holmes is the proposed full-time station manager. He is the son of Lee Holmes. In the event of a grant he will relocate to Honolulu (Ka'lkena Ex. 4). Mr. Holmes is a graduate of Oxidental College. In 1979 be became general manager of Western Systems, Inc. where he is currently responsible for program procurement and the selection and purchase of movies for the premium movie channel on Guam Cable TV, Saipan Cable TV and Rota Cable TV Systems. In 1982 he also became a special projects manager of Western Systems, Inc. (Ka'lkena Ex. 4). Mr. Holmes has extensive experience in operating cable systems (Ka'lkena Ex. 4). From December 1981 to March 1982 Mr. Holmes worked for Channel 18 in Los Angeles one hour per week on Sundays (Tr. 1176, 1177).

55. Karen Kanakanui is the proposed full-time director of news/sports/local programming. She is the daughter of Richard Kanakanui and presently resides in Los Angeles, California. She will relocate to Honolulu in the event of a grant (Ka'lkena Ex. 6). Ms. Kanakanui holds a Masters of Science Degree in Telecommunications from Syracuse University. From 1977 to 1981 she worked as a producer/announcer for West Virginia Public Radio (Ka'lkena Ex. 6). In 1983 Ms. Kanakanui worked as a legislative reporter for West Virginia Public Radio. She is currently em-

ployed as a production director for a magazine (Tr. 1183, 1184).

56. Henry Osborne is the proposed full-time program director. He is a black male, presently a resident of Washington, D.C. but will relocate to Honolulu in the event of a grant. Mr. Osborne is a graduate of George Washington University Law School and is presently employed by WRC-TV as the manager of local program. Prior to joining station WRC-TV in 1979, Mr. Osborne worked as assistant to the president and program director of station WRAU(TV), Peoria, Illinois from 1975 to 1978. In 1975, Mr. Osborne worked briefly in the Federal Communications Commission's Cable Television Bureau. Mr. Osborne has won two awards for programming he has produced (Ka'lkena Ex. 8).

57. *Media Central, Inc.* MCI does not propose to integrate any of its principals into the day-to-day operation or management of the proposed station and does not claim any comparative enhancement or minority or female ownership (MCI Ex. 2).

58. *Down To Earth.* Catherine J. Hoshijo is the proposed full-time manager of the station. She is a Japanese-American female. Her reported address in Honolulu is her father's address. Her father has lived there since 1967. Since 1980, Ms. Hoshijo has spent most of her time in California visiting Honolulu during that period for a total of about seven months (Tr. 501). In 1972, Ms. Hoshijo lived in Kauai, one of the outer islands (Tr. 507). In 1973, she lived in Luaui, Kanai and in Newport, California (Tr. 508). From 1973 to 1975 she lived in Mauai (Tr. 509). From 1976 to 1980 she lived in Honolulu (Tr. 510). She intends to move back to Honolulu on a permanent basis in the event of a grant. In 1977, DTE started a health natural food store in Honolulu. Since then it has acquired Summit Productions, a video production company (Tr. 551). Ms. Hoshijo helped decide on the corporate structure of DTE (Tr. 512). She was elected Vice President of the corporation in February of 1983 and at that time became its 59% stockholder (Tr. 516, 517). In 1977, Ms. Hoshijo founded an organization called the Self-Sufficiency Association (SSA). This organization conducted cooking demonstrations which evolved into a television program "Kathy's Kitchen" aired over PBS stations (DTE Ex. 4). Much of this activity has centered in California (Tr. 530, 600). Ms. Hoshijo plans to continue her involvement in the Kathy's Kitchen program and will produce two additional series with thirteen programs each (Tr. 543, 611). In addition, she will write and

publish an additional cookbook to be used in connection with the program (Tr. 608).

59. Lawrence J. Olsen is the proposed full-time operations manager (DTE Ex. 3). He presently resides in Honolulu (DTE Ex. 5). Mr. Olsen is one of the original founders of Down to Earth Corporation. He is the manager of Summit Productions, Inc. which is a full service production company. It produces political ads, commercials and two television series: "Kathy's Kitchen" distributed nationally on a PBS Satellite System and "Chris Butler Speaks" a philosophical lecture series (DTE Ex. 5). It is proposed that Summit Productions will become part of the Down To Earth Television operation. It is also proposed that the Down To Earth station will also be a filmed and television production company. Since 1977, Mr. Olsen has been production advisor to the Self-Sufficiency Association. He has also been affiliated with the Science of Identity Foundation, a non-profit tax-exempt religious organization. He devotes approximately two hours a week to the foundation and would continue his production work for SSA and SIF should the construction permit be granted.

60. Patrick Bishop is the proposed full-time director of local programming (DTE Ex. 3). He is of Japanese-American descent (DTE Ex. 2). He has lived in Honolulu for 10-1/2 years and continuously since 1977 (DTE Ex. 6). He is an actor by profession and is currently not regularly employed (Tr. 703). He founded the Artist Actors Workshop/Reflection Theater Ensemble in December 1981, which provides free acting workshops for members of the public. Mr. Bishop also teaches free acting workshops at the Wesley Foundation (DTE Ex. 6). Mr. Bishop had the leading role in benefit performed for the John Howard Association, an organization involved with the rehabilitation of mentally disabled persons and prison inmates (Id).

61. Christina J. Stuart proposes to devote 40 hours per week as director of public affairs (DTE Ex. 7). She has been a resident of Honolulu for the past 5-1/2 years. Since November of 1977, Ms. Stuart has been the volunteer public relations director for the Self-Sufficiency Association. She currently devotes five to ten hours a week for this organization, but will cut back her involvement in the event of a grant. Since 1977, she has also provided informal public relations services to the Science of Identity Foundation. She acted as a co-host of Radio Health Talk Show on radio station KIOE (now KZHI) in Honolulu from July 1982 to April 1983 (DTE Ex.7). Currently she is floor

manager/secretary for Summit Productions.

Auxiliary Power

62. Channel 5 and FMI propose to utilize an auxiliary power source at both studio and transmitter location (Channel 5 Ex. 4; FMI Ex. 2). Ka'lkena proposes an emergency generator to serve as a source of power during an emergency (Ka'lkena Ex. 1).

Conclusions of Law

Issue I — Air Hazard Issue

63. The following applicants have been granted summary decision under the air hazard issue: Channel 5, DTE, FMI, and Ka'lkena. The remaining applicants Polynesian and MCI have demonstrated that clearance from the FAA has been obtained. Accordingly, the air hazard issue has been met by all the applicants to this proceeding.

Issue 2 — City Grade Coverage Issue

64. Section 73.685(a) of the Commission's Rules requires that a VHF television station place a 74 dBu (city grade) signal contour over its entire community of license. The legal boundaries of the city of Honolulu are coextensive with the county of Honolulu. Here, none of the applicants will provide the requisite city grade coverage to the entire coextensive city and county of Honolulu due to its approximately 1,500 mile spread. However, at the minimum, each of the applicants will provide city grade service to a vast majority of the Honolulu urbanized area as defined in the 1980 Census, if not the entire area. In *Lee Optical and Associated Companies Retirement and Pension Fund Trust* (MM Docket No. 83-1338), MM-1348, released December 22, 1983 (Chief, Audio Services Division), at paragraphs 7 and 22, a waiver of the city grade coverage requirement was granted to an applicant for an FM facility in Honolulu that proposed city grade service to a "vast majority" of the Honolulu urbanized area as defined in the 1980 Census. This precedent supports a grant of a waiver of Section 73.685 under the circumstances prevailing here. Issue 2

therefore is resolved in favor of each of the applicants.

Standard Comparative Issue

Diversification

65. The Commission indicated there are two primary objectives toward which the processes of comparison should be directed: (1) the best practical service to the public; and (2) a maximum diffusion of control of the Media of Mass Communications. Diversification is the more significant of the factors. *C.J.L. Broadcasting, Inc.*, 54 RR 2d 1037 (Rev. Bd. 1983), and *Multiplex Communications, Inc.*, 54 RR 2d 733 (Rev. Bd. 1983). In evaluating the significance of media interests under the diversification criterion, media holdings in the proposed community of license will normally be of the most importance, followed by other interests in the remainder of the service area and finally, by interests in the nation generally. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Other important factors to weigh are the degree of the applicants' ownership and control in these media and their significance in terms of size and coverage, and in relation to other media in their respective areas.

66. MCI is the permittee of commercial television station KHAI in Honolulu. It proposes to modify its facilities by vacating UHF Channel 20 and shifting to VHF Channel 5. Relying on the *Valdosta Broadcasting Company*, 11 FCC 769 (1946) and *Julie P. Minor* v. *FCC* 633 F.2d 152 (D.C. Cir. 1980) MCI argues that as an existing licensee it should be awarded a preference rather than a demerit under the diversification criterion. Although the Review Board in *Minneapolis Star and Tribune Co.*, 88 FCC 2d 1604, 50 RR 2d 1481 (Rev. Bd. 1982), under somewhat similar circumstances, acknowledged that Commission policy ought not automatically disadvantage an existing licensee seeking a different frequency, it, nonetheless, granted a slight preference to a newcomer, the non-licensed applicant, on the grounds that the newcomer's proposal offered "the certainty of diversity *at the time*". The same analysis applies here. MCI will be assessed only a slight demerit for its media holdings. The Review Board further stated that, lacking Commission precedent, an existing licensee seeking to change frequency in a community is not entitled to an "improvement expectancy" akin to the renewal expectancy ac-

corded broadcasters seeking renewal of license.

67. In addition to being the permittee of Channel 20 in Honolulu, MCI and its principals have numerous other broadcast interests. MCI's interests are centered in Ohio, Missouri and Alabama. Its principals have interests in Mississippi, Tennessee, Oregon, Washington, Idaho, Wisconsin, Texas, Kansas, Colorado and Florida. All of these holdings are distant and have little impact on the question of media concentration in Honolulu and do not alter the degree of demerit assessed MCI under the diversification criteria above.

68. Although Ka'lkena has no media interests, its principals do possess media holdings. However, these holdings are too distant to have sufficient impact with respect to media diversification in Honolulu. Consequently, Ka'lkena will be assessed only a slight demerit under the diversification criterion.

69. Down To Earth's principals Hoshijo and Olsen control Aloha Channel 14 which is to produce and supply for broadcast a weekly prime time program for a period of six years on Channel 14. While Hoshijo and Olsen both testified that they would dispose of this interest if their application is granted, this promise cannot be credited as it was made after the "B" cut-off date and no demonstration of any ability to effectuate the divestiture was made. DTE owns Summit Productions, a video production company which is the largest independent production company in Hawaii. Summit produces political ads, commercials and two series for public television. In addition, it provides footage for local and international news services. Minor significance will be attached to these activities because of their limited impact on media concentration in the Honolulu area. DTE will be assessed only a very slight diversification demerit.

70. None of the other applicants in the proceeding have any diversification handicaps. Each of them therefore, is entitled to a diversification advantage over MCI, Ka'lkena and DTE. As to MCI and Ka'lkena the preference is only slight and very slight as to DTE.

Integration of Ownership and Management

71. FMI proposes to integrate its two stockholders into the operation of the station on a full-time basis. This full-time integration is enhanced by 100% local ownership, 49% minority ownership[5] and 100% female ownership. The integration proposal

[5] In *Horne Industries, Inc.*, 54 RR 2d 249, (Rev. Bd. 1983) the Review Board

is further enhanced by 100% civic involvement. Ms. Bachran's integration proposal has been challenged on the grounds that FMI's Certificate re Increase of Authorized Capital Stock was not filed until after the "B" cut-off date. But this is of no consequence. What is controlling is that the corporate resolution increasing the number of authorized shares and the issuance of shares to Ms. Bachran was adopted before the "B" cut-off date and was reported in an amendment filed with the Commission on the "B" cut-off date. FMI was legally bound by this resolution. FMI is entitled to integration credit for Bachran's ownership because it made timely full disclosure of its intentions.

72. Channel 5 proposes to integrate both general partners in full-time management-level positions. Dr. Dodd will be general manager and Ms. Kaneshiro will be general sales manager and public affairs director. This full-time 100% integration is enhanced by the following factors: 100% local residence; 100% minority ownership; 100% female ownership; 100% civic involvement; and 50% broadcast experience. Although the other applicants attack the integration proposal of Channel 5, the record indicates that Channel 5's limited partnership agreement was an arms length transaction. None of the parties argue that the limited partnership agreement does not conform with the provisions of the Uniform Limited Partnership Act of 1976.[6] The agreement clearly places control over the operation and management of the proposed television station with the general partners. In addition, the agreement proscribes the limited partner or partners from taking part in, or interfering in any matter with, the management or conduct of the business of the partnership. It expressly states that the limited partners have no right or authority to bind or act for the partnership (See Channel 5 Ex. 1, attachments pages 30-31; FCC Order 84M-2218, released May 11, 1984). Channel 5's general partners will assume all of the risks of the partnership and are responsible for all the partnership debts. Dr. Dodd's and Mrs. Kaneshiro's testimony regarding Channel 5's formation and Channel 5's proposal regarding integration and management was unequivocal and completely trustwor-

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stated that the general threshold for awarding any significant comparative qualitative enhancement for integrated minority ownership should be set at a more than 50% (or otherwise controlling) interest level; a lower level of integrated minority ownership maybe decisional in otherwise deadlock cases.

[6] In *Attribution of Ownership Interests*, 55 RR 2d 1465 (1984) the Commission stated that it would use the Uniform Limited Partnership Act of 1976 (6 ULA Section 101, et seq.) as a standard in evaluating the independence of general partners.

thy. There is no evidence to indicate that Mr. Tunis is anything more than a limited partner for Channel 5. The actions attributed to Mr. Tunis herein, were in conformity with the provisions of the Uniform Limited Partnership Act of 1976.[7] The cases cited by the other applicants are inapposite. In *Kist Corporation*, FCC 84R-74, a Review Board Decision released October 19, 1984, a 5% stockholder provided all the financing and assumed all the risks. In *Henderson Broadcasting Company*, 63 FCC 2d 419 (Rev. Bd. 1977), only the non-voting stockholder could sign checks and in addition have the power to appoint, discharge, and fix the compensation for employees. Channel 5's agreement precludes its limited partner from participating in any such activities. In *Berryville Broadcasting Company*, 70 FCC 2d 1 (Rev. Bd. 1978),

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[7] Article 3 of the ULA provides in pertinent part:

302. Voting. — Subject to Section 303, the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter.

303. Liability to Third Parties. — (a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

(1) being a contractor for or an agent or employee of the limited partnership or of a general partner;

(2) consulting with and advising a general partner with respect to the business of the limited partnership;

(3) acting as surety for the limited partnership;

(4) approving or disapproving an amendment to the partnership agreement; or

(5) voting on one or more of the following matters:

(i) the dissolution and winding up of the limited partnership;

(ii) the sale, exchange, lease mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;

(iii) the incurrence of indebtness by the limited partnership other than in the ordinary course of its business;

(iv) a change in the nature of the business; or

(v) the removal of a general partner.

(c) the enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by

an integration proposal of two general partners was discounted, in part, due to the two partners' failure to comply with the partnership agreement. And *Metro* Broadcasting, Inc., 55 RR 2d 290 (Rev. Bd. 1984) did not involve a limited partners integration proposal.

73. Polynesian Services Corporation initially proposed to integrate 100% of its stockholders into management positions.[8] However, the integration proposal of Polynesian's President, Secretary-Treasurer, 15% stockholder and proposed general manager, Mr. Fasi, was made contingent upon the outcome of his race for mayor of Honolulu. It was proposed that if elected Mr. Fasi would place his stock in a blind trust, resign as officer and director of Polynesian. By amendment, filed January 22, 1985, Polynesian advises that Mr. Fasi was elected mayor of Honolulu. Consequently, since Mr. Fasi has withdrawn by a voluntary act, Polynesian can be credited with only 80% integration. This 80% integration is enhanced by local residence[9] and 65% community involvement.[10] The 80% integration proposal is further enhanced by 50% minority ownership and 10% female.[11] Polynesian's integration commitment is further credited with McAlester's (15%) broadcast experience.

74. Ka'lkena proposes to integrate 100% of its stockholders into full-time station positions. This 100% quantitative integration is enhanced by 65% minority, and 26% female ownership. Ka'lkena can also be credited with 74% broadcast experience.[12]

75. Media Central proposes no integration of its owners into the

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him in the business of the limited partnership.

[8] A 5% stockholder, Connie McCracken, obtained her interest after the "B" cut-off date and, accordingly cannot be credited under Polynesian's integration proposal.

[9] While Mr. Piltz lives on the separate island of Maui, he is entitled to credit for local residence due to the unique television service situation in Hawaii. All television service in Maui is provided via satellite stations from Honolulu stations, therefore meaning that the island is part of the Honolulu market. *Television and Cable Factbook*, Vol. 52, p. 264-266. *See also*, *Waters Broadcasting Corp.*, 81 FCC 2d 1260, 52 RR 2d 1063 (1982) *aff'd sub nom.*, *West Michigan Broadcasting Co. v. FCC*, Case No. 82-2583, D.C. Cir., decided May 25, 1984.

[10] Although Bertha Laubscher has been substituted for Kurt Laubscher, she will not be credited for civic involvement because the record contains no evidence of any civic involvement on her part.

[11] The general threshold for awarding any significant comparative qualitative enhancement for integrated female as well as minority ownership is more than 50%. See *Horne Industries, Inc.* above.

[12] Cynthia Char (13%) and Richard Kanakanui (13%) have no broadcast experience.

management of the proposed station.

76. Down To Earth proposes to integrate its four stockholders into the operation of the station on a full-time basis. This 100% integration is qualitatively enhanced by local residence, 74% minority and 66% female ownership. Down To Earth can also be credited with the civic involvement on the part of Mr. Bishop and Christina Stuart (22%). Mr. Olsen's civic involvement may not be credited because his services were provided in the course of his employment at Summit Productions. Mr. Hoshijo's civic activity was centered in California and cannot be credited as a Honolulu related civic activity.

Auxiliary Power

77. Ka'lkena, FMI and Channel 5 all propose auxiliary power and are therefore entitled to a slight preference.

Final Comparative Evaluation

78. All the applicants but MCI propose integration of their owners into management. The following chart indicates the enhancing characteristics of each applicant:

Applicant	*Amount of Integration*	*Local Residence*	*Minority Ownership*	*Female Ownership*	*Civic Involvement*	*Broadcast Exper.*
FMI	100%	100%	49%[13]	100%	100%	0%
Channel 5	100%	100%	100%	100%	100%	50%
Polynesian	80%	80%	50%	10%[14]	65%	15%
Ka'lkena	100%	0%	65%	26%[15]	0%	74%
MCI	0%	0%	0%	0%	0%	0%
DTE	100%	100%	74%	66%	22%	0%

FMI, Channel 5 and Polynesian are each credited with a slight preference under diversification as to MCI and Ka'lkena and a very slight preference as to DTE. FMI, Channel 5 and Ka'lkena will receive a slight preference for their respective proposals to utilize auxiliary power. In light of this foregoing analysis, Channel 5 is clear winner and will be awarded the grant.

79. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of

[13] See footnote 5, *supra.*
[14] See footnote 5, *supra.*
[15] See footnote 5, *supra.*

Channel 5 Broadcasting Associates (File No. BPCT-830223KF) for a construction permit to build and operate a new UHF television station on Channel 5 in Honolulu, Hawaii, IS GRANTED and the applications of Family Media, Inc. (File No. BPCT-830110KE); Polynesian Services Corporation (File No. BPCT-830223KJ); Ka'lkena Lani TV Corporation (File No. BPCT-830223KK); Media Central, Inc. (File No. BPCT-830223KL) and Down To Earth, Inc. d/b/a TV 5 of Honolulu (File No. BPCT-830223KM) ARE DENIED.[16]

FEDERAL COMMUNICATIONS COMMISSION

JOHN M. FRYSIAK, *Administrative Law Judge*

[16] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Candor
Issue, Deletion of
Misrepresentation
Misstatement

A showing that an applicant's antenna site proposal is infeasible does not by itself constitute a *prima facie* showing warranting the addition of a misrepresentation/candor issue under Section 1.229 absent the allegation of specific facts demonstrating an intent to deceive.

—*Gary D. Terrell*

MM Docket No. 84-961

FCC 85R-82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Gary D. Terrell	MM Docket No. 84-961 File No. BPCT-840604KI
Rita L. Young	MM Docket No. 84-962 File No. BPCT-840723KG
For Construction Permit Cumberland, Maryland	

Appearances

Mark E. Fields, on behalf of Gary D. Terrell; and, acting *pro se*, *Rita L. Young*.

DECISION

Adopted: October 4, 1985; Released: October 7, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING ONLY IN THE DISMISSAL OF THE APPLICATION.

BY MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Gary D. Terrell (Terrell) and Rita L. Young (Young) for a new UHF television broadcast station on Channel 65 at Cumberland, Maryland. Presiding Administrative Law Judge Byron E. Harrison (ALJ) found that Young was in default because of her failure to exchange any hearing exhibits on the specified dates and her failure to comply with an Order, FCC 85M-1332, released March 29, 1985, directing her to file an amendment accurately stating her engineering proposal. He therefore issued a Summary Decision (S.D), FCC 85D-33, released May 14, 1985, on his own motion in which he dismissed Young's application and granted Terrell's.[1] The proceeding is now before the Review Board on an appeal taken by Young, which Terrell does not oppose.

2. Young does not appeal the dismissal of her application and the grant of Terrell's; indeed, on April 24, 1985, she petitioned the ALJ to dismiss her application because of health problems in her family.[2] Instead, Young's complaint stems from an Order, FCC 85M-336, released January 23, 1985, in which the ALJ added issues to determine whether Young had reasonable assurance that her proposed antenna site would be available and whether Young had made any misrepresentations to the Commission or had demonstrated a lack of candor with regard to her antenna proposal. Simultaneous with her application dismissal request, Young filed a motion asking that the misrepresentation/candor character issue pending against her be resolved in her favor. In the S.D., para, 11, the ALJ denied the latter request, stating that the requirements of Section 1.251 of the Commission's Rules, 47 C.F.R. § 1.251, for a summary decision on this issue had not been

[1] In the Order designating these applications for hearing, Mimeo 0489, released October 26, 1984, in addition to the standard comparative issue, an air hazard issue was designated against both applicants. The issue against Terrell was resolved in his favor by summary decision in January, 1985, and no issues are now outstanding against him. The air hazard issue against Young is still outstanding.

[2] This request was dismissed as moot in the S.D.

met. He further held in ordering clause (a) that "should Young file another application with the Commission, these matters may be considered in that proceeding. See *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980)." These rulings by the ALJ are the only portion of the S.D. to which Young excepts. Because we believe that the challenged character issue was not properly added in the first place, we shall grant Young's exception.

3. The site availability and misrepresentation issues were added as a consequence of a petition filed December 20, 1984, by Terrell. Young did not file an opposition to Terrell's petition[3] even though Terrell requested the addition of a total of eight issues, all arising out of the asserted inaccuracy of Young's antenna proposal.[4] Among the issues requested were whether Young's proposal complied with FAA requirements, whether her engineering proposal was valid, and whether she had been negligent in preparing her application. As previously noted, the ALJ added only a site availability issue and a misrepresentation/candor issue, the latter being the most serious of the issues requested since it raised a question of Young's character qualifications. However, examination of Terrell's unopposed petition reveals that it provided insufficient support for a character issue. Besides detailing the apparent impossibility of Young's antenna proposal, Terrell's petition merely asserted that Young failed to secure the permission of the owner of the tower to mount her antenna on it. Terrell made no specific factual allegations that Young had made misrepresentations to the Commission or exhibited a lack of candor. The only support for Terrell's petition (other than information contained in Young's application) was a letter from Bernard Stevens, vice-president and general manager of the licensee of Station WROG-FM. Mr. Stevens indicated that an inquiry had been made about Young's use of the tower some months before and that he had had a limited correspondence with Young on the subject. He stated that he told Young that WROG was not adverse to renting her space on the tower, but that they would first have to arrive at satisfactory terms. He also quoted Young as telling him that all that was necessary to obtain

[3] On January 31, 1985, about a week after the release of the ALJ's order, Young filed a pleading asking the ALJ to delete the issues. The ALJ treated this as a petition for summary judgment and denied it by Order, FCC 85M-1066, released March 14, 1985.

[4] Specifically, Terrell alleged that Young proposed to mount her antenna at 1200 feet above ground level (AGL) on the existing 1400-foot tower of Station WROG-FM, but that the existing tower is actually only 130 feet AGL in height.

reasonable assurance of site availability was for an applicant to make a site request, and that details could be negotiated later.

4. It is clear from the material presented to the ALJ that Young exhibited a significant degree of carelessness (and perhaps ineptness) in preparing and prosecuting her application, and her site availability efforts, regardless of how well-intended, appear to have fallen short of what is required by Commission precedent to establish reasonable assurance[5] — a matter which we need not reach herein. However, both misrepresentation and lack of candor require evidence of an intent to deceive. *Fox River Broadcasting Co.*, 93 FCC 2d 127, 53 RR 2d 44 (1983). In adding the character issue, the ALJ made no mention of specific facts relating to such an intent. He simply stated the physical or mathematical problems with Young's antenna proposal (see note 4, *supra*), and observed that it appeared that "WROG-FM has never had any negotiations with Young which would suggest she can expect to have the use of this antenna tower." FCC 85M-336, *supra*, at 1. Carelessness and a mistake of law are entirely different matters from an intent to deceive. We find that in the instant case sufficient allegations of fact were not presented to constitute a *prima facie* showing that Young misrepresented facts to the Commission or exhibited a lack of candor in specifying her proposed antenna site. Consequently, the requirements of Section 1.229 of the Rules, 47 C.F.R. § 1.229, were not met, and the character issue should not have been added. *See Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1099, 50 RR 2d 1251, 1258 (Rev. Bd. 1982); *Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172, 1175-77, 49 RR 2d 1004-05 (Rev. Bd. 1981); *cf. South Florida Broadcasting Co., Inc., supra* (misrepresentation/candor issue not automatically designated with site availability issue). Therefore, the challenged language in ordering clause (a) of the S.D. (which is quoted at paragraph 2, *supra*) will be stricken.

5. ACCORDINGLY, IT IS ORDERED, That ordering clause (a) of the Summary Decision, FCC 85D-33, released May 14, 1985, IS MODIFIED in accordance with paragraphs 2 and 4 hereof; and

6. IT IS FURTHER ORDERED, That the Motion to Sever and Grant, filed by Gary D. Terrell on June 19, 1985, IS DISMISSED as moot; and

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[5] *See, e.g., Houston Family Television, Ltd.*, FCC 85R-56 (Rev. Bd. 1985); *South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840, 57 RR 2d 495 (Rev. Bd. 1984).

7. IT IS FURTHER ORDERED, That the application of Rita L. Young (File No. BPCT-840723KG) IS DISMISSED, and the application of Gary D. Terrell (File No. BPCT-840604KI) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 85D-33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Gary D. Terrell	MM Docket No. 84-961 File No. BPCT-840604KI
Rita L. Young	MM Docket No. 84-962 File No. BPCT-840723KG
For Construction Permit Cumberland, Maryland	

Appearances

Mark E. Fields on behalf of Gary D. Terrell; *Fred B. Bartlett* on behalf of Rita L. Young; and *Larry A. Miller* on behalf of the Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE
BYRON E. HARRISON

Issued: May 9, 1985; Released: May 14, 1985

Preliminary Statement

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, issued a *Hearing Designation Order* (*HDO*), released October 26, 1984, designating for hearing the mutually exclusive applications of Gary D. Terrell (Terrell) and Rita L. Young (Young) for a new UHF commercial television station on Channel 65 at Cumberland, Maryland.

2. The *HDO* specified, in addition to the standard comparative issue, an air-hazard issue with respect to the applications of both Terrell and Young (Issue 1). In addition, paragraphs 4, 5 and 9 of

the *HDO* required Young to submit a map showing the predicted service contours and to clarify the answer to Section 11, Item 8(b), FCC Form 301, within 20 days from the date the *HDO* was issued. By *Order* released January 23, 1985 (FCC 85M-336), two issues were added against Young concerning site availability and possible misrepresentation.

3. On January 24, 1985, a prehearing conference was held, and a procedural schedule was established with respect to an exchange of exhibits in support of the issues added against Young by *Order* released January 23, 1985, and the exchange of each applicant's entire direct case on the comparative issues. The hearing was rescheduled to commence on May 7, 1985.[1]

4. On December 24, 1984, Terrell filed a Motion for Summary Decision based upon a notice from the Federal Aviation Administration (FAA) that the Terrell proposal would not constitute a hazard to air navigation. A favorable summary decision was released on January 24, 1985, with respect to the air hazard issue pending against Terrell.

Findings of Fact

The Young Application

5. Few, if any affirmative facts exist with respect to the Young application. Rather, information as shown by the hearing record will be detailed concerning Young's failure to timely or otherwise file information as directed by the *HDO*; failure to file timely or otherwise the hearing exhibits and the frozen direct comparative case; and the total failure to ever file any acceptable information about its proposed tower site.

6. Young did file an amendment on November 15, 1984, which appeared to provide the information responsive to Section 11, Item 8(b), Form 301, as requested in the *HDO* and purported to assert that Young did not have to seek an FAA no hazard ruling since it proposed to side-mount its antenna on an existing tower. This entire matter of the antenna tower and site quickly became a matter of total confusion and remains so to this date. The original Young antenna proposal was to side-mount her antenna at the 1200 feet above ground level (AGL) of the existing 1400-foot AGL antenna tower for Station WROG-FM. On December 20, 1984, Terrell sought an enlargement of issues against Young and, among other things, attached to that motion an affidavit from the

[1] This date has been postponed without date in view of the action taken herein.

owner of the WROG-FM tower that the tower was only 130 feet AGL, and there were no meaningful negotiations with Young for the use of this tower. Young has twice tried to file corrective amendments concerning its proposal to side-mount its antenna on the WROG-FM tower and with each proposed amendment, the entire matter became more confused. Both proposed amendments were rejected and finally by *Order* released March 19, 1985 (85M-1332), Young was ordered to file correct and accurate engineering on its antenna proposal within 10 days or risk the dismissal of its application for failure to prosecute. No response to this order, timely or otherwise, has been received. Thus, the only proposal Young has on file for its antenna is the patently defective side-mounting at the 1200-foot AGL of a 1400-foot AGL antenna for Station WROG-FM. Since this tower is only 130 feet AGL, the Young proposal is one not possible to accomplish. It follows that the engineering for an antenna 1200-foot AGL has little relevance to an antenna which must be side-mounted on an antenna 130 feet AGL.

7. In addition to Young's failure to ever clear up its engineering proposal, it is in default on other matters. Both parties were required by procedural dates as established at the January 27, 1985, prehearing conference to make a preliminary exchange of engineering exhibits on April 8, 1985. Young never made the exchange timely or otherwise. On April 19, 1985, Young was required to exchange all of its proposed exhibits in support of the two issues added by *Order* released January 23, 1985. These exhibits were never exchanged, timely or otherwise. On April 29, 1985, both parties were required to exchange their entire direct case on a frozen basis with respect to the standard comparative issue. Young has not exchanged its direct comparative case, timely or otherwise. In summary, Young's engineering proposal is unknown, it has defaulted with respect to all exhibit exchanges, and the air hazard issue specified against it remains unresolved as does the site availability and misrepresentation issues.

The Terrell Application

8. The Terrell application involves only the standard comparative issue and the air hazard issue. As indicated in paragraph 4 *supra*, the air hazard issue has been favorably resolved by summary decision. The standard comparative issue will become

moot if the Young application is dismissed.

Conclusions

9. The Young application is in hopeless default after repeated opportunities to amend it engineering proposal, as well as a total default as to the exchange of any exhibits as it was directed to do so at the prehearing conference held on January 24, 1985. Accordingly, the Young application will be dismissed with prejudice for failure to prosecute. With the dismissal of the Young application, the comparative issue becomes moot and the Terrell application can be granted.

Other Matters

10. On April 22, 1985, Terrell filed a Motion to Dismiss the Young application for failure to prosecute. On April 24, 1985, Young[2] filed a pleading entitled "Motion for Summary Judgment, Dismissal of Pending Applications and Proceedings." On May 1, 1985, Terrell filed an Opposition to the Young pleading. What Young appears to be seeking is first a favorable resolution of the basic character issue as pending against her. Next, Young seeks the dismissal of both her application and the application of Terrell. With respect to the Terrell application, Young asserts *pro se* that Terrell has "unclean hands" because "I [Young] believe that a conspiracy exists between Mr. Terrell and his consultant, Contemporary Communications (Larry G. Fuss), to monopolize all TV channels (Channels 52 and 65) in Cumberland, Maryland."

11. To the extent that both Terrell and Young seek dismissal of the Young application, these requests will be dismissed as moot since the Young application will be dismissed on the presiding Judge's own motion. Young's request that the basic character issues be favorably resolved are totally without foundation or merit. Even assuming for the sake of argument that such requests were to be considered, it would have to demonstrate, pursuant to Section 1.251 of the Rules, that "there is no genuine issue of material fact for determination at the hearing." Young fails to even cross the threshhold under this test. Young's request that the Terrell application be dismissed is likewise without foundation. While not so stated by Young, it appears that she is seeking an enlargement of issues against Terrell pursuant to Section 1.229 of the Rules. Aside from the fact that this is a late

[2] While Young has been represented by counsel up to this point, this pleading was filed by Young on a *pro se* basis.

filed request, the request is based upon her unsupported "belief," and this request is totally defective under this test as set out in Section 1.229 of the Rules.

Accordingly, IT IS ORDERED as follows:

(a) Young's request in the nature of a favorable summary decision on the basic issue IS DENIED, and should Young file another application with the Commission, these matters may be considered in that proceeding. See *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980);

(b) Young's request in the nature of a Motion to Enlarge Issues against Terrell IS DENIED;

(c) Young's motion to dismiss the Young application IS DISMISSED AS MOOT;

(d) Terrell's motion to dismiss the Young application IS DENIED as moot;

(e) The application of Young IS DISMISSED with prejudice; the application of Terrell IS GRANTED.[3]

FEDERAL COMMUNICATIONS COMMISSION

BYRON E. HARRISON, *Administrative Law Judge*

[3] In the event exceptions are not filed within 30 days after the release of this Summary Decision and the Commission does not review the case on its own motion, this summary Decision shall become effective 50 days after its public release pursuant to 47 C.F.R. 1.276(d).

Administrative Finality
Circumstances, Change in, Substantial or Significant
Gray Areas
Remand
Transmitter, Site Location
White Area

Proceeding remanded to assess the impact of relocation of operational transmitter towers on pending proposals. Relocation may have the effect of eliminating existing nighttime white and gray areas. This constitutes a change in core circumstances of decisionally significant facts requiring further proceedings and takes precedence over need for administrative finality.

—*Golden State Broadcasting Corp.*
BC Docket No. 79-56

FCC 85-622

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Golden State Broadcasting Corp. Tucson, Arizona	BC Docket No. 79-56 File No. BPH-10,041
TUCSON Community Broadcasting, Inc. Tucson, Arizona	BC Docket No. 79-10,345 File No. BPH-10,345
Tucson FM Broadcasting Corporation Tucson, Arizona	BC Docket No. 79-59 File No. BPH-10,347
For Construction Permit for a New FM Station	

ORDER

Adopted: November 22, 1985; Released: December 5, 1985

BY THE COMMISSION:

1. Now before the Commission is an Application for Review filed June 29, 1983 by Tucson Community Broadcasting, Inc. (Tucson Community) seeking review of the Review Board's Decision,[1] granting the application of Tucson FM Broadcasting, Inc. (Tucson FM) for a new FM station in Tucson, Arizona and denying the mutually exclusive applications of Tucson Community and Golden State Broadcasting Corp. (Golden State).[2] Also before the Commission is a Contingent Application for Review filed June 7, 1983 by Tucson FM.[3] On September 6, 1983, a non-party to this proceeding, Stop-the-Towers Coalition (Coalition), filed a motion to accept its late-filed pleading, denominated "Appeal from Decision of Review Board, Motion to Intervene as Amicus Curiae and Petition to Deny." Tucson FM filed a Petition to Deny Coalition's pleading on September 7, 1983. While the above pleadings were pending, Tucson Community also filed several additional pleadings: a Petition to Accept Supplement to Application for Review, a Petition to Accept Further Supplement to Application for Review, a Petition to Enlarge Issues, a Petition to Accept Third Supplement to Application for Review, and a Petition to Accept Fourth Supplement to Application for Review.[4]

2. In its latest pleadings Tucson Community requests the Commission to take into consideration the existence of three FM stations recently authorized to operate at the same transmitter

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[1] *Golden State Broadcasting Corp.*, 94 FCC 2d 212, 54 RR 2d 348, released May 9, 1983.

[2] Tucson FM filed an Opposition to Tucson Community's Application for Review on July 14, 1983, to which Tucson Community filed a Reply on July 27, 1983. A Motion to Strike Tucson Community's Reply Pleading, filed by Tucson FM on August 1, 1983, will be granted pursuant to Section 1.115(f) of the Commission's Rules prohibiting unsolicited responsive pleadings.

[3] A third applicant, Golden State Broadcasting Corp., has not sought reconsideration or review of the Review Board's Decision. Accordingly, its application will be dismissed.

[4] These were filed June 8, August 24, and November 19, 1984, and May 31 and September 3, 1985, respectively. Tucson FM filed responsive pleadings on June 20, August 29 and December 19, 1984, and June 6, 1985 respectively. Also pending before the Commission are four requests for Official Notice filed by Tucson FM on January 4, February 28, March 14, and April 11, 1985, a Petition to Accept Opposition to Request for Official Notice filed by Tucson Community on January 22, 1985 and a Petition to Accept Reply to Opposition to Petition to Accept Third Supplement to Application for Review, filed by Tucson Community on June 25, 1985.

site proposed by Tucson FM.[5] Tucson Community claims that these stations have eliminated the nighttime white area to be served by Tucson FM. Tucson Community further argues that, since Tucson FM was awarded a construction permit on the basis of its nighttime service to this underserved area, and since this area appears to have been eliminated, the very foundation of the ALJ's and the Review Board's decisions no longer remains.

3. Tucson Community's request presents a conflict between two basic administrative law principles: the doctrine of "administrative finality" versus the rule of "changed circumstances." The Review Board recently had occasion to explore this very question in *Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 225, 55 RR 2d 1326, 1336 (1984), *review denied*, FCC 85-318, released June 20, 1985. Under the doctrine of administrative finality, the administrative record is frozen at a predetermined point in time.[6] In favor of administrative finality is the recognition that, "order, expedition and finality in the adjudicatory process are appropriate weights in the scale as reflecting a public policy which has authentic claims of its own."[7] Underlying the principle of changed circumstances is the recognition of the need to consider "potentially decisional facts available to the agency after the close of the evidentiary record, but while the case remains within the jurisdiction of the agency and before judicial disposition." *Daytona Broadcasting*, 97 FCC 2d at 226.

4. There are no hard and fast rules dictating mechanistic application of either doctrine. Instead, each case must be decided on its own facts, with due care given that the agency refrain from acting arbitrarily and capriciously. While the question is close, we feel that under the circumstances of this case, the public interest considerations weigh more heavily in favor of the rule of changed circumstances. Both the Review Board and ALJ considered comparative coverage the single most important determinative factor in this case, with the Board stating: "We do agree with the ALJ that the provision of a first nighttime service here to over 5,000 people remains the most significant distinction in this otherwise razor-thin comparative contest between Tucson FM and

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[5] The Commission authorized existing Tucson FM stations KWFM, KIIM and KJYK to relocate their transmitters and antennas to the site proposed by Tucson FM on May 16, 1984, July 25, 1984, and March 7, 1985 respectively.

[6] *See e.g., Valley Telecasting Co., Inc.* v. *FCC*, 336 F.2d 914, 917, 2 RR 2d 2064 (D.C. Cir. 1974); *The Western Connecticut Broadcasting Company*, 69 FCC 2d 1890, 1897, 44 RR 2d 1093 (1978). *See generally, Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 294-297 (1974).

[7] *Valley Telecasting Co., Inc.* v. *FCC*, 336 F.2d at 917.

Community and is therefore decisive."[8] Similarly, the Administrative Law Judge held that the, "decisive factor is the Tucson FM preference for its superior coverage. It reaches an appreciably larger nighttime white area that does TCB."[9]

5. Here the decisive factor "is not merely material but rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case."[10] In effect, the elimination of the white area goes to the very foundation of the Board's and ALJ's Decisions. Since the proceeding is still before the Commission, it has "not become final in the sense that it [is] no longer subject to change upon reconsideration."[11] We are compelled to consider those changed events which strike "at the very basis which had been assigned by the [Review Board] for its decision, and were disclosed at a time when the decision was still open for reconsideration."[12]

6. Although a full comparative hearing has already been held in this proceeding and the record has been closed pursuant to Section 1.258 of our Rules, Tucson Community has presented newly discovered evidence that was not discoverable at the time of hearing through due diligence and which, if true, would affect the ultimate decision. *Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72, 73-74, 38 RR 2d 1338, 1340-1341 (1976). The request to consider additional evidence therefore is founded on more than unsubstantiated, speculative contentions. Although the new authorizations noted above appear to have substantially reduced the size of the white area to be served, we are nonetheless unable, on the record before us, to make a final determination on this point. We are therefore compelled to remand this case to an Administrative Law Judge for further proceedings. On remand the ALJ is to determine the extent to which these new authorizations have affected the applicants' comparative coverage proposals and whether a grant to Tucson FM is still warranted under the totality of the circumstances or whether a grant to Tucson

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[8] Rev. Bd. Dec., para. 14. The Board also noted that, "Tucson FM's coverage preference is by far the most important difference between the applicants because it will mean the inauguration of a first FM broadcast reception service to significant numbers of persons." Rev. Bd. Dec., para. 15.

[9] *I. D.*, para. 51.

[10] *Cf. Greater Boston Television Corp.* v. *FCC*, 149 U.S. App. D.C. 322, 463 F.2d 468 (1971), *cert. denied sub nom. WHDH, Inc.* v. *FCC*, 402 U.S. 950 (1972).

[11] *W. S. Butterfield Theatres* v. *FCC*, 237 F.2d 552, 556 (D.C. Cir. 1956).

[12] *Id. See also Storz Broadcasting Co.*, 3 FCC 2d 56, 7 RR 2d 551 (Rev. Bd. 1966); *accord with Brainerd Broadcasting Co.*, 37 FCC 785, 3 RR 2d 684 (Rev. Bd. 1964).

Community will better serve the public interest, convenience and necessity.[13]

7. In a pleading filed November 19, 1984[14] Tucson Community also charges that the Federal Aviation Administration (FAA) has withdrawn approval of its opponent's transmitter site. This pleading generated a series of response.[15] Based on these responsive pleadings, and the FAA documents apended thereto, of which we take official notice, we are able to conclude that no material and substantial question of fact or law remains regarding the FAA's approval of Tucson FM's transmitter site. Accordingly, we accept the FAA's latest determination that Tucson FM's use of the proposed site, and the specified frequency, will cause no hazard to air navigation. Hence, we will deny Tucson Community's request to enlarge issues to consider this question.

8. Given our determination to remand this proceeding on the limited question of the impact of changed circumstances on the outcome of this case, we see no useful purpose to presently address the numerous other issues raised in the pleadings now before us. These other issues may be mooted by the results reached in the supplemental phase of the proceeding. Accordingly, consideration of such other matters will be deferred pending the outcome of the remanded proceeding.

9. ACCORDINGLY, IT IS ORDERED, That the Petition to Accept Supplement to Application for Review filed June 8, 1984 by Tucson Community Broadcasting, Inc. IS GRANTED and the Supplement IS ACCEPTED.

10. IT IS FURTHER ORDERED, That the Petition to Accept Further Supplement to Application for Review filed August 24, 1984 by Tucson Community Broadcasting, IS GRANTED and the Further Supplement IS ACCEPTED.

11. IT IS FURTHER ORDERED, That the Petition to Accept Third Supplement to Application for Review filed May 31, 1985 by Tucson Community Broadcasting, Inc. IS GRANTED and the

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[13] In light of our action here, we need not consider Tucson FM's Contingent Application for Review, which pertains to comparative coverage advantages accrued under a superseded factual situation. We will accordingly dismiss that pleading. At the same time we reject Tucson Community's contention that we must consider the availablity of alternative services in assessing the extent of any white areas. *Daytona Broadcasting Corp.*, FCC 85-318, released June 20, 1985 and *Elba Development Corp.*, FCC 85-254, released May 13, 1985.

[14] Petition to Enlarge Issues, filed November 19, 1984, by Tucson Community.

[15] *See* note 3, *supra*.

Third Supplement IS ACCEPTED.

12. IT IS FURTHER ORDERED, That the Petition to Accept Fourth Supplement to Application for Review filed September 3, 1985 by Tucson Community Broadcasting IS GRANTED and the Fourth Supplement IS ACCEPTED.

13. IT IS FURTHER ORDERED, That the Review Board's Decision, 94 FCC 2d 212, IS SET ASIDE, That the Application for Review of the Review Board's Decision filed June 29, 1983 by Tucson Community Broadcasting, Inc. IS GRANTED to the extent noted herein and IS DISMISSED in all other respects, and that this proceeding IS REMANDED to the presiding Administrative Law Judge for further proceedings in accordance with this Order and for preparation of a Supplemental Initial Decision.

14. IT IS FURTHER ORDERED, That the burden of introducing evidence in the further proceedings ordered SHALL BE upon Tucson FM Broadcasting Corporation, Inc., and the burden of proof SHALL BE upon Tucson FM Broadcasting Corporation, Inc.

15. IT IS FURTHER ORDERED, That the Contingent Application for Review of the Review Board Decision's filed June 9, 1983 by Tucson FM Broadcasting Corporation, Inc. IS DISMISSED.

16. IT IS FURTHER ORDERED, That the Motion to strike Reply Pleading filed August 1, 1983, by Tucson FM Broadcasting Corporation, Inc. IS GRANTED and that the Reply Pleading filed July 27, 1983 by Tucson Community Broadcasting, Inc. IS DISMISSED.

17. IT IS FURTHER ORDERED, That the Petition to Accept Late Filed Pleadings and the Appeal from Decision of Review Board, Motion to Intervene as Amicus Curiae and Petition to Deny both filed September 6, 1983 by Stop-the-Towers Coalition ARE DISMISSED.

18. IT IS FURTHER ORDERED, That the Petition to Deny Motion to Accept Late Filed Pleadings filed September 7, 1983 by Tucson FM Broadcasting IS DISMISSED.

19. IT IS FURTHER ORDERED, That the Petition to Accept Reply to Opposition to Petition to Accept Third Supplement to Application for Review filed June 25, 1985 by Tucson Community Broadcasting, Inc. IS DENIED and that the Reply Pleading filed June 19, 1985 IS DISMISSED.

20. IT IS FURTHER ORDERED, That the Petition to Enlarge Issues filed November 19, 1984, by Tucson Community Broad-

casting, Inc. IS DENIED.

21. IT IS FURTHER ORDERED, That the Requests for Official Notice filed January 4, 1985, February 28, 1985, March 13, 1985 and April 11, 1985 by Tucson FM Broadcasting Corporation, Inc. ARE GRANTED.

22. IT IS FURTHER ORDERED, That the Petition to Accept Opposition to Request for Official Notice filed January 22, 1985 by Tucson Community Broadcasting, Inc. IS GRANTED and that the Opposition pleading IS ACCEPTED.

23. IT IS FURTHER ORDERED, That the Application of Golden State Broadcasting Corp. (File No. BPH-10,041) IS DISMISSED for failure to prosecute.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appeal
Application, Dismissal With Prejudice
Failure to Prosecute

Review Board affirmed ALJ's dismissal of application for failure to prosecute. Applicant repeatedly failedto comply with procedural deadlines.

—*Hillebrand B/cing, Inc.*

MM Docket No. 85-13

FCC 85R-69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HILLEBRAND BROADCASTING, INC. Sanibel, Florida	MM Docket No. 85-13 File No. BPH-830217AI
GUMBO LIMBO BROADCASTING, INC. Sanibel, Florida	File No. BPH-830610AC
ISLAND BROADCASTING, INC. Sanibel, Florida	File No. BPH-830713AA
RIVIERA COMMUNICATIONS-SANIBEL, INC. Sanibel, Florida	File No. BPH-830714AO
EDENS BROADCASTING, INC. Tampa, Florida	File No. BPH-830714AT
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ODER

Adopted: August 14, 1985; Released: August 16, 1985

BY THE REVIEW BOARD; BOARD MEMBER JACOBS ABSENT.

1. The Review Board has under consideration an appeal filed July 15, 1985 by Punta Ybel Communications, Ltd. (Punta Ybel) from a *Memorandum Opinion and Order* (FCC 85M-2735, released July 10, 1985) by presiding Administrtaive Law Judge (ALJ) Edward J. Kuhlmann dismissing its application in this proceeding. The ALJs ruling was in response to an unopposed motion filed June 11, 1985 by Hillebrand Broadcasting, Inc. (Hillebrand) requesting the ALJ either to compel answers to interrogatories it served on Punta Ybel or, in the alternative, to dismiss Punta Ybel's application for failure to prosecute. For the reasons that follow, we will deny the appeal.[1]

2. Punta Ybel initially contends that the ALJ lacked authority to summarily dismiss its application, arguing that 47 CFR § 1.323(d) prescribes a two-stage procedure that requires a presiding officer to issue an *Order* directing parties to answer interrogatories before imposing sanctions for failure to comply. Appellant adds that, if the intent of the instant *Memorandum Opinion and Order* was to imply that Punta Ybel had demonstrated a lack of interest in prosecution of its application, such intent was erroneous because Punta Ybel has a history of diligent prosecution of its appliction, which history includes various statements it has filed and a petition to enlarge issues. Finally, it asserts that the *Memorandum Opinion and Order* cannot stand because it lacks any decisional analysis; is unfair because another applicant in this proceeding was allowed a period of time to show cause why its application should not be dismissed; and would defeat the public interest because its dismissal would remove from the choice of applicants the only locally owned applicant. Oppositions to this appeal were filed by Hillebrand, Riviera Communications-Sanibel, Inc. (Riviera) and Gumbo Limbo Boradcasting, Inc. (Gumbo Limbo).[2] After consideration of Punta

[1] Because the hearing in this proceeding was scheduled to convene on August 5, 1985, the parties were orally notified prior to hearing that Punta Ybel's appeal had been denied.

[2] Punta Ybel also filed a limited reply to respond to new matters raised in the oppositions. We have not considered this new matter in reaching our disposition and will dismiss the reply as unauthorized. *See* 47 CFR § 1.301(c)(7).

Ybel's arguments, we affirm the ALJ's ruling.

Discussion

3. The Board has previously recognized that "reasonable discretion must be vested in the officer who guides the course of the proceedings." *Pan American Broadcasting Company, Inc.*, 89 FCC 2d 167, 170 (Rev. Bd. 1982) *quoting NLRB* v. *Phaostron Instrument & Electric Co.*, 344 F.2d 917, 920 (9th Cir. 1965); *see also Broadcast Data Corp.*, 97 FCC 2d 650, 652 (Rev. Bd. 1984) (ALJ has broad power to regulate the course of a hearing). The Commission's procedural requirements, however, "are not to be wielded with Draconian, mechanical, or insensitive finality." *Pan American Broadcasting Company, Inc., supra.* Our task is to ensure that a correct balance is struck between the need of the Commission to protect the integrity of its procedures and administrative techniques and the public's interest in seeing that its scarce broadcast facilities go to the best qualified applicants. *Sco-Kim, Inc.*, 90 FCC 2d 960, 963 (Rev. Bd. 1982).

4. In the instant case, Punta Ybel's initial contention that the ALJ could not dismiss its application without first directing it to answer interrogatories is without merit, because the contention ignores the fact that the ALJ also had before him an alternative request to dismiss Punta Ybel's appliction for failure to prosecute. Indeed, Punta Ybel does not contest the ALJ's well-established authority to dismiss the applications of those unwilling or unable to prosecute.[3] Furthermore, its claim of diligent prosecution is belied by the record. The commission has stated that the "[p]rosecution of an application means compliance with procedural and substantive rules . . . . " *Vue-Metrics, Inc.*, 69 FCC 2d 1049, 1058 (1978). Here, Hillebrand's request to dismiss Punta Ybel's application recited the following shortcomings on the part of Punta Ybel: (1) counsel for Punta Ybel failed to enter an appearance at the prehearing conference in this proceeding; (2) Punta Ybel failed to meet the deadline set by the ALJ (*Order*, FCC 85M-1780, released April 22, 1985) for filing statements on integration and diversification; (3) Punta Ybel also failed to meet the deadline (*Order*, FCC 85M-1780, *supra*) for filing its corporate or partnership documents, and appropriate references to state law; and (4) Punta Ybel failed, as required by 47 CFR § 1.323(b), to

[3] Although Punta Ybel points out that it has filed a petition to enlarge issues, we have previously held that such filings do not of themselves necessarily betoken a sufficient desire to promote an application. *See Sco-Kim, Inc., supra*, 90 FCC 2d at 962.

answer or object to interrogatories served on it by Hillebrand or to ask for an extension of time to respond to the interrogatories. The ALJ noted further in his *Memorandum Opinion and Order* (para. 4) that Punta Ybel had not answered interrogatories served on it by Gumbo Limbo nor responded to the motions relating to it that were pending before him (*i.e.*, Hillebrand's motion to compel answers to interrogatories or to dismiss application and Gumbo Limbo's consolidated motion to compel answers). Although Punta Ybel ultimately filed belated answers to the interrogatories (*i.e.*, after the release date of the *Memorandum Opinion and Order* dismissing its application), the ALJ had ample reason, in light of Punta Ybel's cumulative record, to conclude that the applicant lacked a serious intent to prosecute its application, particularly where a response to the motion to dismiss would have, at minimum, apprised the ALJ as to the applicant's intentions. *See generally Filmway of Wisconsin*, 54 RR 2d 913 (Rev. Bd. 1983)[4]; *Sco-Kim, Inc., supra.* Thus, Punta Ybel cannot now be heard to complain that the ALJ erroneously dismissed its application (he waited 28 days before acting on the motion), when Punta Ybel either was unwilling or uanble to respond to the motion.

5. Furthermore, we disagree with appellant that the ALJ's legal analysis was insufficient to support his action in dismissing Punta Ybel's application. Hillebrand alleged various deficiencies in its motion for dismissal, thereby placing Punta Ybel on notice that its application was in jeopardy for the reasons stated; the ALJ merely granted the motion on the basis of the unopposed allegations, without stating additional reasons. Thus, we have no difficulty in perceiving the basis for the ALJ's ruling; and as indicated in para. 4, above, the shortcomings in Punta Ybel's prosecution of its application were numerous. Nor do we find it significant that the ALJ gave another applicant (Sanibel Broadcasting) a period of time to respond or show cause why its application should not be dismissed for failure to prosecute. The ALJ's ruling regarding Sanibel Broadcasting was made in response to that applicant's failure to respond to a petition to

[4] In *Filmway*, an application was dismissed for failure to prosecute where the applicant failed to submit proof that it had published notice of the hearing as required by 47 CFR § 73.3594, failed to submit information ordered by the *Hearing Designation Order*, failed to respond to a notice of deposition and failed to produce documents, and failed to respond to a motion to dismiss its application. The Board in *Sco-Kim, Inc., supra*, found that dismissal of an application was justified where the applicant failed to respond, or responded belatedly to a number of important options, incldinga motion to dismiss, and to interrogatories.

enlarge issues filed against it, and served to place it on notice that its inaction could result in the dismissal of its application. Here, however, Punta Ybel was served with a motion requesting the dismissal of its application. An additional *Order* by the ALJ was not necessary to provide notice to Punta Ybel that its inaction could result in dismissal of its application. Moreover, Punta Ybel's contention that the ALJ should have afforded it additional time to respond to discovery is unpersuasive in light of Punta Ybel's failure to ask for an extension of time to respond to the interrogatories or to apprise the ALJ of its intentions. Punta Ybel's argument that its dismissal would defeat the public interest in that it would eliminate the only locally owned applicant in this proceeding is unavailing. All applicants, whether locally owned or not, are expected to adhere to reasonable procedural requirements; Punta Ybel is the only one of the above-captioned applicants that has failed to comply with numerous deadlines in this proceeding. Thus, its arguments go predominantly to *its* interests, not the public's. And, from what we can see, even its *own* interest in prosecuting its application is quite faint.

6. In sum, we find that the ALJ acted within his discretion in dismissing Punta Ybel's application. Punta Ybel's repeated failure to comply with procedural deadlines has frustrated the efforts of the other parties to proceed with the prosecution of this case in an orderly and timely fashion. Certainly, this agency need not and should not indulge an applicant that repeatedly expends little or no effort to submit basic information in an orderly and timely fashion, especially where as here there are numerous other applicatns eager to provide expeditiously a broadcast service to the Sanibel area.

7. ACCORDINGLY, IT IS ORDERED, That the Appeal From Ruling Dismissing Application and Terminating Right of Participation, filed July 15, 1985 by Punta Ybel Communications, Ltd. IS DENIED; and

8. IT IS FURTHER ORDERED, That the Motion to Accept Limited Reply to Oppositions to Appeal, filed July 26, 1985 by Punta Ybel Communications, Ltd. IS DENIED; and that its petition for leave to amend filed August 2, 1985 IS GRANTED and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Reconsideration, Petition for

Review Board denied petition for reconsideration of *MO&O* which had denied an appeal from a ruling dismissing appellant's application. Appellant essentially sought to reargue facts leading to its dismissal.
—*Hillebrand B/cing, Inc.*
MM Docket No. 85-13

FCC 85R-94

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Hillebrand Broadcasting, Inc. Sanibel, Florida	MM Docket No. 85-13 File No. BPH-830217AI
et al.	*et seq.*
For Construction Permit for a New FM Broadcast Station	

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1985; Released: November 20, 1985

1. The Review Board has under consideration a petition filed September 16, 1985 by Punta Ybel Communications, Ltd. (Punta Ybel) seeking reconsideration of *Memorandum Opinion and Order* (*MO&O*), FCC 85R-69, released August 16, 1985, in which we denied an appeal from a ruling by the presiding Administrative Law Judge (ALJ) dismissing Punta Ybel's application.* The

* An errata and erratum to the petition for reconsideration were filed on September 17, and October 4, 1985, respectively. Punta Ybel also filed a motion to accept the petition for reconsideration on September 17, 1985, and a motion to accept reply to oppositions to petition for reconsideration on October 4, 1985. Although a petition for reconsideration does not lie here, *see* Section 1.291(c)(3) of the Commission's rules ("[p]etitions requesting reconsideration of an interlocutory ruling made by ... the Review Board ... will not be entertained"), no one has opposed the filing on that ground. *See also* Section

Board recited a number of procedural deficiencies on the part of Punta Ybel in its *MO&O*, *supra*, including a failure to respond to a motion to dismiss its application based on said deficiencies, and held that the ALJ had ample reason, in light of the applicant's cumulative record, to conclude that the applicant lacked a serious intent to prosecute its application, particularly where a response to the motion to dismiss would have apprised the ALJ as to the applicant's intentions. Punta Ybel now contends, however, in its petition for reconsideration that the recited deficiencies were taken out of context and do not in fact reflect a lack of interest on its part in prosecuting its application. Oppositions were filed by Hillebrand Broadcasting, Inc., Gumbo-Limbo Broadcasting, Inc., and Riviera Communications-Sanibel, Inc.

2. We will deny the petition for reconsideration. Contrary to the contention in its petition, the deficiencies complained of, but not disputed, by Punta Ybel were not taken out of context since they formed the basis of the *unopposed* motion to dismiss which was granted by the ALJ. Punta Ybel's attempt now to argue the lack of significance of those deficiencies comes too late, and in any event is unpersuasive. The applicant had ample opportunity to make its argument in response to the motion to dismiss — the ALJ waited 28 days before acting on the motion. It cannot now complain that such arguments were not taken into consideration when the ALJ dismissed its application. In any event, the deficiencies in themselves are a reflection that Punta Ybel repeatedly ignored the deadlines imposed by the ALJ on all of the parties to the proceeding. It must now live with the consequences of its actions or non-actions. In essence, Punta Ybel merely seeks to reargue the facts leading to the dismissal of its application. It is well established, however, that reconsideration will not be granted merely to reargue matters previously considered and resolved. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Company* v. *FCC*, 351 F.2d 824 (D. C. Cir. 1965), *cert. denied*, 338 U. S. 967 (1966).

3. ACCORDINGLY, IT IS ORDERED, That the motions to accept petition for reconsideration and reply to oppositions to petition for reconsideration, filed September 17 and October 4, 1985, respectively, by Punta Ybel Communications, Ltd., ARE GRANTED; and

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1.102(b)(2) of the Rules. We have thoroughly considered the merits of appellant's request.

4. IT IS FURTHER ORDERED, That the petition for reconsideration, filed September 16, 1985 and corrected on September 17 and October 4, 1985, by Punta Ybel Communications, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Common Carrier, International Competition

Report and Order establishes competitive carrier policies for international telecommunications common carriers. Commission establishes two primary product markets (IMTS and Non-IMTS) and finds that each foreign jurisdiction is a separate product market. Commission finds AT&T and offshore telephone companies to be dominant for IMTS. Commission finds no carrier dominant for non-IMTS. Comsat found to be dominant for space segment, multi-purpose and television services.

—*International Carrier Policies*

CC Docket No. 85-107

FCC 85-585

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
International Competitive Carrier Policies	CC Docket No. 85-107

REPORT AND ORDER

Adopted: October 31, 1985; Released: November 15, 1985

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I. Introduction and Background

1. On April 19, 1985 we released a Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding to solicit comments on the advisability of streamlining the tariff and facility regulation of certain international telecommunications carriers. Comments in response to the NPRM were filed on May 24, 1985.[1] Reply comments were filed on June 17, 1985.[2]

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[1] Comments were filed by Aeronautical Radio, Inc. (ARINC), American Broadcasting Companies, Inc., CBS, Inc., and National Broadcasting Company, Inc. (combined comments), American Satellite Company, Argo Communications Corporation (Argo), Association of Data Processing Service Organizations, Inc. (ADAPSO), Comsat International Communications, Inc. (Comsat), Equatorial Communications Services (Equatorial), Fedex International Transmission Corp. (Fedex), GTE Communications Services (GTE), Hawaiian Telephone Company (Hawaiian Telephone), International Communications Association (ICA), Inter-

A. Domestic History

2. The streamlined regulations we adopt today are modeled after those adopted in the domestic *Competitive Carrier* rulemaking proceeding.[3] We initiated the domestic *Competitive Carrier* proceeding in 1979 in light of the increasingly competitive domestic telecommunications market.[4] The foundation of *Competitive Carrier* was our finding that, in a competitive environment, market forces could provide the public the statutorily mandated protection against unreasonably high rates and undue discrimination. That is, marketplace forces could replace regulation and make unnecessary burdensome regulatory requirements for both non-dominant carriers and the Commission.

3. Unnecessary Title II regulatory burdens in the domestic

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national Relay, Inc. (IRI), ITT Communications Services, Inc. (ITT), MCI International, Inc. (MCII), Overseas Telecommunications, Inc., (Overseas), The Puerto Rico Telephone Company, RCA Global Communications, Inc. (RCA), Satellite Transmission and Reception Specialists (STARS), Satellite Business Systems (SBS), SIN, Inc., Southern Satellite Systems, Inc. (Southern Satellite), TDX Systems, Inc. (TDX), TRT Telecommunications Corporation (TRT), U.S. Telecom, Inc. (U.S. Telecom), and The Western Union Telegraph Company (Western Union). TRT's comments were filed late but were accompanied by a motion to accept. We shall grant this motion.

[2] By order adopted June 14, 1985, the date for filing reply comments was extended from June 14 to June 17. Mimeo No. 5214. Reply comments were filed by ABC, CBS, and NBC (Combined Reply), ARINC, AT&T, Comsat, Equatorial, Fedex, GTE, ICA, Hawaiian Telphone, IRI, ITT, MCII, Overseas, Puerto Rican Telephone, RCA, SBS, SIN, STARS, State of Hawaii, TDX, TRT, and Western Union. IRI's reply comments were filed late but were accompanied by a motion to accept. We shall grant this motion. Hawaiian Telephone filed several additional pleadings. Although unauthorized, we shall accept these filings in the docket.

[3] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), *recon.* FCC 83-69, released March 21, 1983; Second Further Notice of Proposed Rulemaking, FCC 82-187, released April 21, 1982; Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28, 292 (June 21, 1983); Third Report and Order, Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46, 791 October 15, 1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, FCC 84-82, released March 22, 1984, 49 Fed. Reg. 11,856 (March 28, 1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd MCI v. FCC, 765 F. 2d 1186 (D.C. Cir. 1985).

[4] A number of Commission decisions prior to the *Competitive Carrier* Rulemaking allowed increased entry into the domestic market. *See*, MCI, 18 FCC 2d 953 (1969), *recon. denied*, 21 FCC 2d 190 (1970); Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *recon.*, 31 FCC 2d 1106 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); MCI Telecommunications

market imposed by the facilities authorization and tariff review process were eliminated for non-dominant carriers in a series of *Competitive Carrier* orders issues over the last five years. In the *First Report and Order* we analyzed carriers' market power and classified those carriers with market power and the ability to exercise that power as dominant while carriers without market power were classified as non-dominant. The carriers found to be dominant, which included AT&T and the independent telephone companies, remained subject to the full panoply of regulatory requirements. Due to certain transitional factors such as facility shortages relative to demand, we also found Western Union, domestic satellite carriers, resellers and miscellaneous common carriers to be dominant. We found, however, that other domestic carriers did not have market power or the ability to set price and, therefore, we streamlined the regulation of these carriers.

4. In the *Second Report and Order* we settled on a forbearance approach for the further reduction of Title II regulation for non-dominant carriers. We determined that the burdens outweighed the benefits in requiring tariff filings and facilities applications with respect to terrestrial resellers. The *Third Report and Order* extended the scope of the *Competitive Carrier Rulemaking* to include services provided to all domestic points outside the continental United States including Hawaii, Guam and Puerto Rico.

5. The *Fourth Report and Order* developed a clear analytical framework, stressing an antitrust analysis, for applying the competitive carrier policies. Further, in the *Fourth Report and Order* we extended forbearance to all domestic resellers and specialized common carriers. In addition, we extended streamlined regulation to all domestic satellite carriers, miscellaneous common carriers and facilities-owing interexchange carriers affiliated with exchange telephone companies. Finally, the *Fifth Report and* Order extended forbearance to domestic satellite carriers providing interstate service, miscellaneous common carriers, carriers providing DEMS systems and affiliates of exchange carriers providing interstate, interexchange services.[5]

Corp., 60 FCC 2d 25 (1976), *rev'd* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (1977) (Execunet); Domestic Satellite Facilities, 35 FCC 2d 844 (1972), *recon.*, 38 FCC 2d 665 (1972); Resale and Shared Use, 60 FCC 2d 261 (1976), *recon.*, 62 FCC2d 588 (1977), *aff'd sub nom.*, AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 213 (1978); Cutomer Interconnection, 61 FCC 2d 766 (1976).

[5] In the *Sixth Report and Order*, which was overturned by the D.C. Circuit Court of Appeals, we required non-dominant carriers to detariff their service offerings.

B. The Notice of Proposed Rulemaking

6. In the NPRM we tentatively concluded that there is now sufficient competition in the provision of international telecommunications services to apply the Commission's *Competitive Carrier* policies to some of those services. We tentatively concluded that international telecommunications services are made up of two product markets, international message telephone service (IMTS) and non-IMTS.[6] This was based upon our finding of substantial demand and supply substitutability among the various non-IMTS services and little demand and supply substitutability between IMTS and any of the non-IMTS services.[7]

7. We tentatively found that, based upon factors such as language and time zone differences, customers were more likely to view IMTS as not substitutable with other international services. This belief was further strengthened by the usage patterns of the various services. While IMTS is a broad-based telecommunications service used by a wide variety of business and non-business users, the various non-IMTS services are primarily used for business purposes. Finally, our analysis of cross-elasticity appeared to show that users did not perceive IMTS to be a good substitute for many of the other international services.[8]

8. Our analysis in the *NPRM* also considered the geographic market or markets in which services are offered. We defined the geographic market in terms of a supplier's ability to provide IMTS or non-IMTS service to a given area or upon a subscriber's ability to receive IMTS or non-IMTS service from a given area

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[6] Examples of non-IMTS services are telex, telegram, TWX, private line, high and low speed data, videoconferencing and International Business Service (IBS).

[7] Demand substitutability refers to a customer's ability and desire to switch among various services based upon the relative prices and interchangeability to use of the services. Factors influencing demand substitutability may include service quality, availability, geographic coverage and marketing of the services in addition to relative price.

Supply substitutability refers to the ability of a supplier to shift resources from the production or supply of one good or service to another in response to changes in market conditions. We tentatively concluded in the NPRM that carriers may more easily shift their facilities among various non-IMTS services than between non-IMTS and IMTS. We indicated our belief that the major factor influencing supply substitutability is the need for a carrier to obtain an operating agreement prior to offering a specific service to a specific country. We found that it is especially difficult for a carrier to obtain an operating agreement for the provision of IMTS. Further, we found that any limited supply substitutability that currently exists from non-IMTS to IMTS is substantially less than from IMTS to non-IMTS.

[8] *See* paragraph 25, *infra*.

via a particular service provider. In the *NPRM* we tentatively found that, primarily due to the need for a carrier to obtain operating agreements, it is proper to define the geographic market on a country-by-country basis. We also tentatively found that a country-by-country approach is best because the relatively small number of facilities that are used to provide international services sometimes makes it difficult for a carrier to shift facilities serving one country to another based soley upon market conditions.

9. The focus of our analysis for reduced regulation was the existence of market power. We proposed that carriers without market power be classified as non-dominant, while those possessing market power be classified as dominant. We tentatively concluded that no carrier in the non-IMTS market and only AT&T and those primary carriers serving non-contiguous domestic points (*i.e.*, Hawaiian Telephone for Hawaii, RCA Globecom for Guam and AAC&R for Puerto Rico) in the IMTS market have the power to control prices or exclude competition.[9] We found this to be true for every country served by these carriers. The factors to be considered in any determination of market power include market share, control of bottleneck facilities, rate of return and actual or potential competition.

10. In the IMTS market we based our tentative finding of AT&T's dominance on its overwhelming market share as well as its position as the major owner of submarine cables. Additionally, we tentatively concluded that certain carriers which provide service between domestic, non-contiguous points and foreign points on a monopoly or near monopoly basis would also be dominant. We tentatively found that all other providers of IMTS are properly classified as non-dominant.

11. Our tentative conclusion that no carrier is dominant to any country for non-IMTS services was predicated upon our belief that any carrier attempting to price uncompetitively would be met by a variety of forces operating to make such action difficult, if not impossible. In particular, we noted that there are multiple firms operating to almost all countries and no firm has a large share of the total non-IMTS market to any country.

12. In the *NPRM* we tentatively concluded that Comsat should be treated differently for its different service offerings. Thus, we proposed treating Comsat as dominant for its provision of space

[9] We also tentatively concluded that any foreign owned carriers operating from the United States would be dominant for the provision of all services due to concerns we have about their ability, in concert with their parent organization, to distort the market. See n.74, *infra*.

segment and multi-purpose earth station services and non-dominant in the provision of IBS and television earth station services as well as any end-to-end services it may provide. We found Comsat to be dominant for space segment and multi-purpose earth station services because it is currently the monopoly provider of these services. On the other hand, we tentatively concluded that Comsat's IBS and television earth station and end-to-end services are offered in a competitive atmosphere with Comsat unable to control price. For these services we found Comsat to be non-dominant.

13. The implementation of *Competitive Carrier* policies would impact both the tariff and facilities licensing requirements carriers must follow. We tentatively proposed to subject the tariffs of non-dominant carriers to the rules that currently apply to streamlined, non-dominant domestic carriers. Under streamlining tariffs would be presumptively lawful and effective on fourteen days notice. Additionally, non-dominant carriers would not be required to file Section 61.38 economic and cost support data when filing tariffs.

14. We also proposed less restrictive facilities licensing regulations. Specifically, we proposed requiring non-dominant carriers to file an initial application under Section 63.01 in order to acquire facilities to provide a particular product (service) to a given country. Once an initial certification is given, a carrier would not need Commission approval to add circuits or modify the use of those circuits to provide additional services within that product market.[10] Rather non-dominant carriers would only have to report circuit additions on a semi-annual basis.

C. Summary of Comments

15. Almost without exception, parties filing comments expressed support for the commencement of this proceeding as well as the approach and analysis used in the *NPRM*.[11] We received very few comments addressing our product and geographic

[10] We did propose to require Commission approval to construct, acquire or operate lines in all major facility projects (*i.e.*, transoceanic submarine cables) or to acquire capacity from any private cable or satellite sources. *See also*, Tel-Optik, Ltd., FCC 85-99, released April 5, 1985 which requires any common carrier wishing to acquire capacity in a private submarine cable to file a Section 214 application.

[11] ARINC did argue that the *International Competitive* Carrier proceeding should be delayed until carriers are granted direct access to INTELSAT, until carriers are allowed to purchase whole circuits in submarine cables and until *Authorized* User, 100 FCC 2d 177 (1985), is implemented.

definitions in anything more than general terms. In the most extensive comments on this part of the *NPRM* TRT argued that our product market analysis was "seriously flawed." Central to TRT's argument is its belief that the use of IMTS for data transmissions (Dataphone service) makes IMTS substitutable with non-IMTS services such as telex. Further, TRT argues that private line service is used more for voice than non-voice service and is properly placed in the IMTS market. Other parties commenting on our product market analysis argued in favor of, respectively, three product markets (U.S. Telecom),[12] one product market (ITT), and a service-by-service market approach (GTE). In the only comments on our geographic market analysis, U.S. Telecom stated that a regional or sub-regional approach would more accurately reflect business and marketing practices.

16. Most of the parties focused their attention on our market power analysis. In the IMTS market, AT&T argued that it should be classified as non-dominant due to actual and potential competition that it faces in all countries. It was the only party to support a finding of non-dominance for AT&T's IMTS service. Other parties supporting our finding of dominance for AT&T for IMTS, pointed out AT&T's world-wide service coverage, ownership/control of facilities and overwhelming market position in all countries.

17. Comments and reply comments filed by Hawaiian Telephone, the State of Hawaii, RCA, ITT and the Puerto Rican Telephone Company discussed at length our finding of dominance for certain noncontiguous domestic IMTS carriers. Only Hawaiian Telephone was strongly opposed to such a finding. RCA stated that it was not adverse to being classified as dominant for IMTS service to and from Guam as long as there was a procedure for being classified as non-dominant at some future time. ITT stated that if we were to classify All America Cables and Radio, Inc. (AAC&R) as dominant for the provision of IMTS service for Puerto Rico then we should also classify the Puerto Rican Telephone Company as dominant if it is allowed to offer IMTS service.

18. On the non-IMTS side, most parties focused on our finding of non-dominance for Comsat and AT&T. Among the arguments raised by parties opposed to our finding of non-dominance for these carriers for non-IMTS services was their established operating relationships, their control of facilities (INTELSAT space

[12] The three products markets are IMTS, low speed data and high speed data.

segment for Comsat; submarine cables, entrance facilities and tail circuits for AT&T), and the possibility of both AT&T and Comsat engaging in the cross-subsidization of their non-dominant activities from their dominant activities. A number of parties also mentioned AT&T's great financial resources as a source of dominance. ABC, NBC and CBS in combined comments, as well as SIN, took issue with our finding of non-dominance for Comsat's provision of television service while it is the only provider of that service.

19. TDX took issue with our tentative finding that all foreign-owned carriers are dominant due to their ability, in concert with their parent organization, to distort the market. TDX argued that our finding discriminated against foreign owned carriers. It argued that we should use the analysis developed in the NPRM to determine, on a country-by-country basis whether it or any other foreign-owned carrier had market power.

20. There was general support for our proposed streamlined tariff and facility licensing requirements although a number of smaller carriers including Southern Satellite, Argo, STARS, Overseas, Fedex and Equatorial argued that we should move to forbearance now or in the near future. ADAPSO and ICA argued that the notice period for discontinuation of service should be longer than the fourteen days implied in the *NPRM*. It was pointed out that arranging private line service requires coordination of a PTT, a U.S. international carrier and a U.S. domestic carrier and can take three months or longer. Finally, TRT argued that we should require Western Union to make an affirmative showing of compliance with the Record Carrier Competition Act of 1981.

II. Discussion

21. Over the last several years the market for international telecommunications services has experienced rapid growth and substantial transformation in terms of both new carriers and new services. Carriers recently entering the international market include most of the entities which filed comments in this proceeding: Argo, American Satellite Company, Comsat International Communications, Equatorial, Fedex, Overseas, STARS, Southern Satellite, TDX, U.S. Telecom, Western Union, IRI, SBS, MCII and GTE Sprint.[13] There are also a large number of

[13] Western Union's review of Section 43.51 filings shows that at least thirty operating agreements for non-IMTS services have been signed since January

resellers and enhanced service providers offering a variety of international services. Among the new service offerings are INTELSAT Business Service (IBS), 800 Service-Overseas and a number of recently introduced high speed data services.[14] We also expect that a number of recent Commission decisions will provide a greater range of service and facility options for customers and carriers. These decisions include *Authorized User*[15], *Earth Station Ownership*[16], *Separate Systems*[17] and *Tel-Optik*.[18]

22. In light of these changes, and based on the record in this proceeding, we shall lessen the burdens of regulation for those carriers providing international services and facilities which face effective marketplace competition and do not have market power.[19] Thus, in this Report and Order we generally adopt the tentative conclusions as they were set forth in the *NPRM*. However, further analysis in light of the pleadings filed leads us to alter some of our conclusions. Thus, while we conclude that the international telecommunications market is comprised of two

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1984 by new entrants such as GTE Telenet, SBS, Graphnet, IRI, CCI, Net-Express and Federal Express.

[14] We also note major changes in the provision of services in several overseas nations. For example, in the United Kingdom, British Telecom has been privatized and a competitive service provider (Mercury) has been established. In Japan, recent legislation indicates that competition may be permitted for both domestic and international services. Finally, in Canada the government has announced plans to privatize Teleglobe Canada.

[15] 100 FCC 2d 177 (1985) (Authorized User II). [Allows non-common carriers to lease INTELSAT capacity directly from Comsat and permits Comsat, through a separate subsidiary, to provide end-to-end services].

[16] Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, 100 FCC 2d 250 (1984). [Provides for the independent ownership of international earth stations].

[17] Establishment of Satellite Systems Providing International Communications, FCC 85-399, — FCC 2d — , released September 3, 1985. [Granting conditional authorizations for international communications satellite systems separate from the INTELSAT system.]

[18] Tel-Optik, Ltd., FCC 85-99, released April 5, 1985.

[19] We do not believe, as ARINC argues, that it is necessary to delay streamlining until carriers have direct access to INTELSAT, the ability to purchase whole circuits in submarine cables, or until *Authorized User* is actually in effect. We do not anticipate that the implementation of competitive carrier policies will increase the ability of overseas administrations to whipsaw U.S. carriers. (Whipsawing is the manipulation of U.S. carriers by a monopolistic PTT, playing one carrier against another, in order to gain favorable terms and conditions). We continue to be very concerned about leverage that PTT's possess when bargaining with multiple U.S. carriers. However, the actions we are taking today will not hinder our ability to monitor the markets and take remedial action. In fact, our uniform settlements policy is designed specifically to minimize the possibility of whipsawing. *See*, Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes (Notice of Proposed Rulemaking), FCC 85-332, released July 3, 1985.

basic product groupings, IMTS and non-IMTS, the record demonstrates that television service is a unique offering and should be treated as a separate product.[20] We further conclude that a country-by-country geographic market approach best reflects the reality of the international marketplace. Additionally, we affirm our tentative conclusion that only AT&T and certain non-contiguous service providers are dominant in the IMTS market for all countries. We also affirm our tentative conclusion that no carrier is dominant in the non-IMTS market. Due to AT&T's unique market position, we will require AT&T to file cost allocation and accounting plans prior to streamlining regulation for any of its non-dominant non-IMTS services. Further, we affirm our tentative conclusion that Comsat is dominant in the provision of space segment and multi-purpose earth station services and non-dominant in the provision of IBS and any end-to-end services it may offer. Although we tentatively concluded in the *NPRM* that Comsat was non-dominant in the provision of television services, we conclude here that Comsat is dominant in the provision of that separate product.

A. Legal Basis for Streamlined Regulation

23. The legal basis for streamlining Title II facility and tariff requirements for non-dominant carriers was set forth in great detail in the *First Report and Order*.[21] In administering the Communications Act, 47 U.S.C. Section 151 *et seq.*, the Commission's directive is to ensure the availability to United States users of "rapid, efficient, nation-wide, and world-wide wire and radio communication services with adequate facilities at reasonable charges."[22] In pursuing these goals the Commission has "broad discretion in choosing how to regulate."[23] Competition and marketplace forces are clearly factors to take into consideration when regulating in the public interest.[24] A further basis for reduced regulation is found in the Record Carrier Competition Act

[20] We also treat space segment and multi-purpose earth station services as separate and distinct products.

[21] 85 FCC 2d at 12-20, 40-44.

[22] 47 U. S. C. Section 151.

[23] *AT&T v. FCC*, 572 F.2d 17, 26, *cert. denied* 439 U.S. 875 (1978).

[24] The court in *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D. C. Cir. 1984), stated that "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances." *See also, FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Hawaiian Telephone Co. v. FCC*, 589 F.2d 647 (D. C. Cir. 1978).

of 1981 (RCCA).[25] The RCCA directs the Commission to forbear from exercising its authority as the development of competition among record carriers for the provision of traditional record services reduces the degree of regulation necessary to protect the public.[26]

24. Our experience in the domestic *Competitive Carrier* proceeding gives us confidence that when a competitive environment exists the goals of the Communications Act are best satisfied by reducing, to the extent practical, entry, exit and general regulatory burdens for non-dominant carriers. Furthermore, less regulation benefits the consumer by allowing carriers to better respond to customer desires at the lowest price on a timely basis. Finally, it should be emphasized that we are in no way abandoning our duties as set forth in the Communications Act. We will retain our power to investigate non-dominant carriers based upon complaints or upon our own initiative to ensure that rates and practices are just and reasonable.

B. Product Market

25. A wide variety of international telecommunications services are currently available to U.S. users. These include IMTS, telex, TWX, low speed data, high speed data, private line, telegram, IBS, teleconferencing and television. The task of dividing them into rational market groupings is not an easy one. For products to be placed in the same market grouping one must find demand or supply substitutability. There is no mathematical formula which yields a precise determination of whether different services are part of the same product markets. We must look at usage and supply patterns as well as available empirical evidence. Our analysis of the available data as well as the pleadings that were filed lead us to affirm our tentative conclusion that IMTS and non-IMTS presently represent two distinct product markets.[27]

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[25] 47 U. S. C. Section 222(b)(1).

[26] In overturning the *Sixth Report and Order* the Court of Appeals for the D. C. Circuit cited the RCCA as an example of a specific grant of authority that would allow the Commission to engage in forbearance. MCI v. FCC, *supra* note 3.

[27] We include 800 Service—Overseas in the IMTS market. *See*, Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs During the Period 1981-1995 (Second Report and Order), FCC 85-457, released August 22, 1985; Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Atlantic Telecommunications Needs During the 1985-1995 Period (Second Report and Order), FCC 85-456, released August 22, 1985.

Most of the pleadings filed expressed general support for this product market determination. We also conclude that television service is currently a unique offering that should be treated as a separate product market.

1. Demand Substitutability

26. Demand substitutability refers to a subscriber's ability and willingness to switch among and between various services. Factors impacting on demand substitutability include service quality, relative prices, availability, and geographic coverage as well as the marketing of the services. As we stated in the *NPRM*, "the key aspects of demand substitutability are the interchangeability of use and the relative prices of the services." Thus, two products, in the relevant price range, which have similar characteristics are said to be substitutes if a rise in the price of product A causes consumers to switch to product B. The smaller the price change and the larger the consumer switch, the closer substitutes the two products are for each other.[28]

27. IMTS is the major international telecommunication service in terms of revenues (over 70%) and circuit requirements (over 80%). In general, all of the non-IMTS offerings are used for transmitting data and other information of a business nature. Further, all of these services are generally used without regard to language and time zone differences between countries. Thus, if the price of a non-IMTS service increases, users can substantially meet their communications needs by switching to another non-IMTS service. Similarly, if the price of a non-IMTS offering decreases, users would be expected to meet a greater portion of their communications needs by switching to that non-IMTS service. In general, data and other information requirements cannot be satisfied by switching from the non-IMTS service to IMTS because this would require verbal transmission of data, which, while not impossible may be slow, inaccurate and inconvenient.[29]

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[28] Substitutability of demand is not, as TRT implies, an absolute proposition. It is not simply a case of products either being substitutes or not being substitutes. Rather, the issue usually is as to the degree of substitutability. Thus, products that are found not to be good substitutes may very well still have some degree of substitutability.

[29] Although IMTS and non-IMTS may be partially substitutable, particularly with the use of Dataphone type customer premises equipment, we do not find that this limited degree of substitutability negates our finding of two primary product markets. See para. 30, *infra.*

28. We are not persuaded that private line services are properly placed in the IMTS market and not in the non-IMTS market as TRT suggests. While private line circuits can be used to provide voice-only service, it appears that they are more heavily used for data purposes and more substitutable with the various non-IMTS services than they are with IMTS. Indeed, the data contained in the carriers' circuit status reports indicate that most international private line circuits are used for alternative voice/data (AVD) service. The same reports indicate that a very few private line circuits are used for voice-only service. TRT offers no support for its assertion that private line offerings are closer substitutes for IMTS than for non-IMTS services.

29. We also affirm our finding that IMTS is not a good substitute for other international telecommunications services. While there is no disagreement among the parties that the non-IMTS services are almost all used exclusively for business purposes, IMTS is used by a much broader range of customers. Also, language and time zone differences are more important issues to a person using IMTS than one using a non-IMTS service. For example, language and time zone differences are not important to high speed data transmission because the computers can work without regard to time or language. Similarly, a telex message can be sent at any time and can be read and/or translated when convenient. It is much less useful, however, to make a telephone call to a nation in which a foreign language is spoken since the caller and recipient must share a common language in order to communicate effectively. Also, in many instances the nation being called is six or more hours ahead or behind U.S. time so that business hours barely overlap, if they do at all. We further note that the preferred way of conducting international business, perhaps because of language, time zone and legal considerations, is by written/recorded transmissions rather than by oral (IMTS) transmissions. Thus, a reduction in the price of IMTS is unlikely to cause non-IMTS users to shift from non-IMTS service to IMTS.[30]

30. TRT makes the broad, unsupported assertion that the existence of Dataphone services means that IMTS is substitutable

[30] See, Rea, John D. and Gerald M. Lage, "Estimates of Demand Elasticities for International Telecommunications Services." *The Journal of Industrial Economics* 363-381 (June 1978). This study indicates, for the 1964-1973 period studied, that IMTS prices are not related to the demand for telex service and that telegraph rates are inversely related to IMTS demand.

with telex and other non-IMTS services.[31] While no record of Dataphone use is available, if Dataphone were a good substitute for non-IMTS service the substitutability would be reflected in non-IMTS usage and growth data. Our review of the relative usage and rate fluctuations of IMTS and telex, as set forth in the NPRM, showed that demand for IMTS is not greatly influenced by telex rates and vice versa. Over the last few years IMTS rates have declined by 50% or more.[32] If Dataphone were a good substitute for telex one would expect a large number of telex users, for which rates remained stable, to switch to IMTS and Dataphone given the lower rates. This did not occur.[33] Thus, the services are not good enough substitutes to warrant placing IMTS and non-IMTS services in the same market grouping.

2. Supply Substitutability

31. Supply substitutability is defined as the ability of a service provider to shift its resources from the manufacture or provision of one product or service to another product or service in response to changes in market conditions or in the pursuit of profits that exceed the opportunity cost of capital.[34] The key to supply substitutability is the lack of substantial entry barriers which permits a supplier to shift its facilities and resources from the provision of one service to the provision of another service in the short-run.

32. Barriers to entry may be technological (*e.g.*, a patent) economic (*e.g.*, capital costs, economies of scale) or legal (*e.g.*, governmental imposed restrictions) in nature. In the domestic market it is relatively easy for carriers to respond to customer demand in the short-run by redeploying existing facilities because there are no substantial technological, economic or legal barriers blocking the reallocation of carrier resources. A number of unique features of the international arena, however, make it difficult for

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[31] GTE argues that the line between IMTS and non-IMTS may eventually be blurred. While this may be so, we are not yet at that point.

[32] For example, from 1980 to 1983 the price of peak period IMTS Direct Dial to the United Kingdom (by far the largest overseas international IMTS market) dropped from $4.80 for the first minute and $1.60 for additional minutes to $2.08 and $1.26 respectively.

[33] The amount of telex traffic continued to grow throughout the period although it did slow from a growth rate of 15.2% in 1980 to 6.3% in 1983. We view this declining growth rate to reflect the increased usage of other non-IMTS services rather than any substantial substitutability between IMTS and non-IMTS offerings.

[34] 95 FCC 2d at 565. *See*, II Areeda and Turner, Antitrust Law 374 (1978).

carriers to reallocate resources among various services.

33. The most significant entry barrier in international telecommunications is the need to obtain an operating agreement before providing a particular service to a particular country. Thus, even though it may be relatively easy from a technological or economic standpoint for a carrier to shift its resources from the provision of one service to the provision of another, it is often quite difficult from a PTT "regulatory" standpoint.

34. In the *NPRM* we expressed our belief that carriers can more easily shift their facilities from the provision of one non-IMTS service to the provision of another non-IMTS service than they can shift non-IMTS facilities to provide IMTS service. This tentative conclusion was based on the limited availability of operating agreements in general, and the fact that the operating agreements of many carriers to provide one non-IMTS service frequently reflect the agreement to provide several non-IMTS services. Further, it appeared to be easier for carriers to gain new operating agreements for non-IMTS service than for IMTS service. The pleadings have not convinced us that these observations were incorrect. While we are not maintaining that it is easy for carriers to obtain non-IMTS operating agreements, the number and nature of existing agreements indicate that it is easier to obtain agreements for non-IMTS than for IMTS services. For example, MCII provides a variety of non-IMTS services (telex, telegram, data and private line offerings) to almost every country but provides IMTS directly to only a handful of countries. The same applies to GTE Sprint. Further, many carriers provide only non-IMTS services (Western Union, FTC, ITT, RCA, IRI) or have only made minor inroads into the IMTS market (SBS and TRT).

35. The existence of resellers and refilers[35] may be evidence of some limited supply substitutability from IMTS to non-IMTS services. However, it seems that the supply substitutability presently works in only one direction—from IMTS to non-IMTS. Given the size and profitability[36] of the IMTS market, non-IMTS

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[35] A refiler provides a service in which traffic is carried from one point (*e.g.*, the U.S.) to another (*e.g.*, the U.K.) and then placed (filed) into the second country's network for delivery within the second country or to additional overseas points. In a refiling situation the refiler may be a carrier or enhanced service provider for the first segment (U.S. to first overseas point) of the transmission and then is a customer of the overseas PTT for the second segment (first overseas point to second overseas point) of the transmission.

[36] AT&T's reported rate of return on IMTS for 1977 to 1979, the last years in which this data was collected was 15%, 23% and 36% respectively. Available aggregated data indicate that AT&T's rate of return for IMTS since 1979 has exceeded its overall authorized rate of return.

carriers would have a strong incentive to shift some of their facilities to IMTS use if they were able to do so. The absence of any significant movement along these lines mitigates against finding IMTS and non-IMTS services to be supply substitutes.

36. Thus, our analysis of demand and supply substitutability leads us to find that, in contrast with the one product market found domestically, international telecommunications services are properly divided into two broad product markets—IMTS and non-IMTS. We also conclude that television service is not substitutable with other services and should be treated separately.[37]

C. Geographic Market

37. The dimensions of the geographic market are based upon a supplier's ability to provide service to a given area or upon a subscriber's ability to receive service in a given area.[38] We affirm our tentative conclusion as set forth in the *NPRM* that every country constitutes a separate geographic market. With the exception of U.S. Telecom, which argued in favor of a regional or sub-regional geographic difinition, no party had serious objections to our tentative conclusion. Our finding is based primarily upon the need for a carrier to obtain an operating agreement prior to providing service to a given country. Thus, a carrier is not free to enter a country to take advantage of prevailing market conditions unless it has the agreement of that country to do so.[39]

38. A carrier may also encounter difficulties if it attempts to shift its facilities from serving one country to serving another based upon market conditions. This is due in part to the limited number of cable and satellite facilities used to provide international services. Additionally, prior to adding or reducing facilities

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[37] Television service is a unique offering with limited demand or supply substitutes. Television cannot be readily substituted for telex, telegram, data, private line or voice services. Further, television service requires a substantial amount of bandwidth (transponder capacity) and is extremely expensive relative to most other services, both IMTS and non-IMTS. This pricing factor limits demand substitutability while the bandwidth factor limits supply substitutability. As indicated above, supply substitutability must exist in both directions. While television capacity could be divided into IMTS and non-IMTS offerings, it would be extremely difficult to combine capacity from a variety of services, employed by a variety of carriers, used by an extremely large number of users and used for service to several countries into a single television service.

[38] 95 FCC 2d 573.

[39] As transborder arrangements such as refiling and transiting increase, or as regional groupings which do not require individual country-by-country operating agreements develop, we may at some future date consider U.S. Telecom's geographic market proposal.

in a country, a carrier must obtain the agreement of the foreign correspondent. These factors make the international market markedly different from the domestic market where carriers have much greater economic and operational flexibility.[40] Thus, in contrast with our finding that the domestic market constitutes a single geographic market, the international geographic market exists in terms of separate and distinct areas determined by national borders. In other words, each country is a distinct geographic market.

D. Market Power

39. A finding of market power for any firm for a given service in a given geographic market would lead us to conclude that the firm is dominant power and that the marketplace would not operate to ensure that the firm would price that service competitively or employ practices consistent with the requirements of the Communications Act. Thus, any firm found to possess market power for a given product and geographic market should be subject to full Title II regulation for the provision of that service. We are aware that differences exist between the domestic and international markets, such as the presence of PTTs with market power in all international markets. Upon further consideration based on further analysis or experience gained from the policy that we are adopting here, we may in the future scale back or reduce the level of Title II regulation on international dominant carriers in view of the different circumstances prevailing in the international market.

40. Traditional antitrust analysis defines dominance as "the power to control prices or exclude competition."[41] There are a number of questions that must be asked to determine whether a firm has market power in a given product and geographic market. A firm is not dominant if it is unable to lower price or employ other practices to drive firms out of the market. However, even if a firm has the ability to lower price to eliminate competition, it is still not necessarily dominant. If, when the firm attempts to raise price in order to reap monopoly profits it encounters entry of new firms into the market, then the firm is non-dominant.[42]

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[40] Domestic carriers are able to provide interstate service throughout the United States. Also, the cost of building facilities is lower and the design flexibility greater domestically than it is internationally.

[41] 351 U.S. at 391; *Areeda & Turner* at 322; 85 FCC 2d 1, 20-22.

[42] If a firm is unable to raise price in the long-run without encountering new entry, then it would not be rational for it to follow a policy of cutting prices in

41. A firm lacking market power does not have the ability to raise prices above the competitive level because other firms will not follow suit and as a result it would lose business or attract entry, forcing prices down to the competitive level. Thus, a non-dominant firm is effectively regulated by marketplace forces, making the imposition of extensive regulations unnecessary.

42. As we stated in the *NPRM*, a determination of a carrier's dominance or non-dominance cannot be made in scientifically precise terms. No factor by itself is determinative. Rather, it is necessary to determine if a firm has the ability to control prices. Factors that may be indicators of such power include market share, rate of return, control of facilities and actual or potential competition. While the ability of a multi-product firm to cross-subsidize its competitive activities with its dominant activities is a concern, we believe that sufficient safeguards can be fashioned to minimize a firm's ability to engage in cross-subsidization.

1. IMTS

43. We affirm our tentative conclusion that AT&T is dominant in its provision of IMTS. We also affirm our tentative conclusion that certain carriers providing IMTS between domestic, non-contiguous points and foreign points are dominant. All other carries currently providing IMTS are non-dominant.

a. AT&T

44. While market share is not determinative of market power, it appears to be a clear indication of dominance for AT&T's provision of ITMS. AT&T is still the only provider of IMTS between the U.S. mainland and the majority of foreign countries. In those countries where there are other IMTS providers, AT&T still has an overwhelming market share.[43] We are not persuaded by AT&T's argument that the current and potential competition it faces is sufficient to justify a finding of non-dominance. Merely because more than one carrier provides service to a given

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the short run, and thereby sacrificing immediate profits, in order to eliminate current competition. Thus, if facilities, interconnection, operating agreements and regulatory approvals were easily and economically obtained, then a firm which had the ability to eliminate competition may still not be dominant. *See* 85 FCC 2d 1, 21 and 80-81; F. M. Scherer, Industrial Market Structure and Economic Performance (2nd Ed. 1980) pp. 232-252.

[43] We estimate, based on the number of circuits used to provide IMTS, that in three markets served by several IMTS suppliers, the U.K., Belgium and Australia, AT&T has IMTS market shares of approximately 91%, 95% and 93% respectively.

geographic area does not automatically mean that all carriers providing service to that area are non-dominant. We have certainly not employed this analysis in the domestic arena. This is especially true when, as here, the secondary carriers in the market have very little market penetration. For example, the latest traffic figures for the United Kingdom, arguably the most competitive IMTS market, show that MCII, the second largest U.S.-U.K. IMTS service provider, has only about 5% of the originating (U.S. outbound) traffic. Perhaps even more telling is that it has a negligible percentage of the terminating (U.S. inbound) traffic.[44]

45. Additionally, while we are adopting a country-by-country approach, we must note that the question of how many different countries the new entrants serve is a factor in determining if AT&T (or any other carrier) faces effective competition. There is clearly some competitive marketing advantage to be gained if a carrier has the ability to serve all or most foreign points because a subscriber is more likely to take service from a carrier with the more comprehensive coverage.

46. The IMTS market then is not sufficiently competitive to ensure that AT&T is unable to manipulate rates in a way that discourages competition. Thus, until such time as competition in the provision of IMTS more fully develops so as to negate AT&T's ability to control prices or exclude competition, it is necessary to continue the full scale regulation of AT&T for its IMTS offerings to all countries. When considering the competitiveness of a particular geographic market we will look at a variety of factors including the number of entrants, market penetration for both inbound and outbound traffic, regional and global market positions, refiling and transiting arrangements, control of facilities and the potential for non-competitive pricing. In the future, as we implement this country-by-country streamlining approach, carriers which seek non-dominant treatment for one country which are dominant for service to another country should clearly present an accounting and cost allocation plan which segregates and identifies on a country-by-country basis all relevant costs and revenues.

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[44] We note that not all operating agreements obtained by AT&T's IMTS competitors provide (or initially provided) for the handling of U.S. inbound traffic. Because the handling of U.S. inbound traffic and the receipt of one half of the agreed upon accounting rate directly influences a route's profitability as well as the U.S. carrier's collection rate for outbound traffic, any analysis of market power which looks at market share must consider both outbound and inbound traffic shares.

b. Noncontiguous Domestic Carriers

47. We also find that it is currently necessary to continue full-scale regulation for certain carriers providing international service for non-contiguous domestic points. Specifically, we find that the following carriers are dominant in their provision of IMTS service: Hawaiian Telephone for Hawaii; Alascom for Alaska; All American Cable & Radio for Puerto Rico; ITT-CIVI for the U.S. Virgin Islands and RCA Globcom for Guam.[45] Of the carriers that filed comments only Hawaiian Telephone strenuously opposed this finding of dominance.[46]

48. We find these carriers dominant because they do not currently face effective competition in their markets. Thus, but for Commission oversight, they would be able to act and price anti-competitively. Additionally, most of these carriers also control the local exchange facilities for the market in question. This constitutes a classic bottleneck and gives these carriers the ability to exclude meaningful competition through discriminatory practices. As other carriers begin to offer international telephone service to and from these markets we would expect to revisit the status of particular local exchange carriers as market developments warrant.

49. Hawaiian Telephone argues that it should be streamlined citing the fact that it has only a small share of the total U.S.-international IMTS market. It does not adequately address, however, the critical question of its dominance in the provision of IMTS to and from Hawaii. We would agree that Hawaiian Telephone would be non-dominant if it wished to provide IMTS to or from the continental U.S. or any other domestic market. However, Hawaiian Telephone has the ability to exert market power in the Hawaiian market. The other carriers it cites as providing Hawaii-international service have only recently initiated service, have little market penetration, employ relatively few circuits and do not, at the present time, offer effective competition to prevent abuses.[47]

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[45] This order does not affect the provision of service between these noncontiguous domestic points and the continental United States. These services were accorded streamlined treatment in the domestic *Competitive Carrier* Third Report and Order, 48 Fed. Reg. 46,791.

[46] AAC&R argued that if it is dominant, then Puerto Rican Telephone should also be dominant when and if that entity is authorized to provide international service. We will address this issue when and if we authorize Puerto Rican Telephone to provide international service.

[47] We note that one carrier providing IMTS service from Hawaii, GTE Sprint, has the same parent corporation as Hawaiian Telephone.

c. Other IMTS Carriers

50. In the *NPRM* we tentatively concluded that all other IMTS carriers (e.g., MCII, GTE Sprint, SBS) are non-dominant. No party had any objection to this finding. None of these carriers serve all markets and the market shares they have to countries which they do serve is minimal. While they may create downward pressure on IMTS rates, there is no way in which they can dominate the market. Thus, we adopt our tentative conclusion and find that all carriers presently providing IMTS except AT&T and the noncontiguous domestic carriers identified above are non-dominant in the provision of IMTS.[48]

2. Non-IMTS

51. We affirm our tentative conclusion that no carrier is dominant in the provision of non-IMTS services for any geographic market. Any non-IMTS service provider attempting to price uncompetitively will be met by market forces making such action difficult if not impossible to sustain. With the exception of our proposed treatment of AT&T and Comsat almost all of the parties supported the streamlined regulation of non-IMTS service providers.

52. In almost every country, and certainly in all major geographic markets, there are a number of firms providing a wide variety of non-IMTS services on both a real time and store-and-forward basis. This includes entities providing telex, TWX, private line, telegram, IBS, low and high speed data, teleconferencing and enhanced service offerings. Thus, any carrier attempting to raise prices for non-IMTS services would find that it would lose business to other carriers offering identical or substitutable services at relatively lower prices. Any carrier lowering prices in an attempt to drive competitors out of the market would find that it was unable to maintain the low prices for a long enough period to drive all competitors out of the market or that competitors would re-enter the market when it attempted to charge monopoly rates.

53. We reject GTE's argument that we must make a finding for each of the major IRCs on a service-by-service basis. Our finding that non-IMTS services, with the exception of television service, are substitutable makes such an analysis unnecessary. The issue

[48] We specifically deal with U.S. carriers which are owned or controlled by foreign entities in paragraphs 72 and 73.

is not whether entry into the telex market or other specific non-IMTS markets is limited, but rather whether entry and competition in the non-IMTS market as a whole are limited. Clearly this is not the case. We particularly note that the rapid growth in new and innovative non-IMTS services such as IBS and the general greater acceptance which appears to be developing among foreign administrations to operate with additional (new) carriers provide sufficient market discipline on the IRCs and other non-IMTS service providers to justify streamlined regulation of their service offerings.

54. AT&T's activities in the non-IMTS market differ significantly from its activities in the IMTS market. Thus, in contrast with the IMTS market where we found AT&T dominant, here we find that AT&T is subject to sufficient market regulation and that it should be classified as non-dominant. However, as further described in paragraph 61, before actually streamlining the regulation of AT&T's non-IMTS activities we will require AT&T to file a cost allocation and accounting plan.

55. AT&T has less than 10% of the total non-IMTS market and is not a major non-IMTS provider to any country. Even to the United Kingdom, the country to which AT&T delivers the largest percentage of its non-IMTS traffic, it has only approximately 11% of the total non-IMTS market.[49] Our finding of non-dominance for AT&T's non-IMTS services, however, does not rest solely upon its small market share. Sharp distinctions can be made between the structure of the non-IMTS and IMTS markets. In the IMTS market, AT&T is the only established carrier and its competitors are recent entrants with extremely small market shares. In the non-IMTS market, however, AT&T is competing with a number of established carriers who have been providing a variety of services for decades. In fact, AT&T is a relatively recent entrant into the non-IMTS market.[50] Additionally, the non-IMTS market is, as TRT stated, miniscule by AT&T's standards. Also, by far the largest portion of its international revenues are derived from IMTS. Thus, it does not appear that it would be rational for AT&T, especially in the face of growing IMTS competition and vigorous non-IMTS competition, to sacrifice IMTS revenues or returns in a highly speculative bid to gain control of the

[49] This is based upon the total number of non-IMTS circuits providing service to the U. K.

[50] While AT&T has always been allowed to offer voice-only private lines, it was not until the decision in *Overseas Communications*, 92 FCC 2d 641 (1982), that AT&T was allowed to offer traditional record, data, alternate voice/data (AVD) and other non-IMTS services.

non-IMTS market. Further, we do not believe that any of the arguments raised by commenters relating to established operating relationships, control of facilities and disparity of resources are sufficient to justify finding AT&T dominant for non-IMTS services.

56. *Established operating relationships.* While it is true, as a number of parties stated, that AT&T has established relationships with every PTT. It is also true that there are a number of non-IMTS service providers that have established similar relationships with most administrations. Further, the movement globally is toward countries opening their markets to increased competition rather than closing them. It also would not seem to be in a PTT's best long-run interests to deal with only AT&T to the exclusion of all other service providers since AT&T does not provide all services.[51] Thus, we do not believe that AT&T's correspondent relationships give it such a significant advantage in the non-IMTS market that would lead to AT&T's being able to control the prices of non-IMTS offerings.

57. *Control of facilities.* AT&T's use and ownership of facilities do not give it dominance in the non-IMTS market. AT&T cannot exercise the degree of unregulated control of facilities that would allow it to exclude competition and justify a finding of dominance. Submarine cables are a joint undertaking of U.S. carriers and their foreign correspondents. All carriers have ownership interests in these cables and can purchase further IRU interests in them. Additionally, carriers are able to use satellite facilities, which are available in large quantities world-wide, to provide service. We have also approved private submarine cables whose capacity will be available to carriers or non-carriers.[52] Finally, the Commission remains actively involved in the facilities planning and consultative process and we will still require a Section 214 license prior to the construction of any submarine cable.

58. While AT&T does control most entrance facilities, they are in fact offered to all carriers on a tariffed basis.[53] The tariffs for these entrance facilities remain subject to full scale regulation. Further, we retain oversight to investigate any of AT&T's practices to determine their lawfulness. Thus we are in a position

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[51] For example, AT&T does not provide telex which is the most significant non-IMTS service in terms of minutes and revenues.

[52] *See, Tel-Optik, supra* note 18. Carriers will have to obtain Section 214 authority in order to purchase capacity in these private systems.

[53] Entrance facilities are those facilities which connect cableheads or earth stations to a carrier's switching center. Some entrance facilities are jointly owned by the carriers.

to prevent possible abuses based upon AT&T's control of these facilities.

59. A number of parties also argued that AT&T's vast domestic facilities network and dominance in the domestic market is reason to find it dominant in the non-IMTS international market. We do not agree. It is true that AT&T is dominant in the domestic telecommunications market.[54] However, as with the entrance facilities, AT&T's domestic lines are subject to full-scale regulation. Further, a wide and growing variety of non-AT&T domestic facility options for carriers and users exist. In fact, a number of non-IMTS service providers have their own domestic networks.[55] Thus, we do not find that AT&T's domestic facilities network is cause to find it dominant in its provision of non-IMTS services.

60. *Disparity of resources and cross-subsidization.* A number of parties raised the issue of AT&T's greater resources as a source of its dominance in the non-IMTS market. It is not apparent, nor is it even intuitive, that AT&T's resources alone justify a finding of dominance. First, AT&T would have to make a corporate decision to devote its resources to the non-IMTS market. Given the relative size of that potential market and its relative unimportance to AT&T's total corporate operations, such a decision is not necessarily predictable. Second, if AT&T attempted to lower its prices below marginal cost to drive out competitors, it would face a difficult task in that it would be trying to drive out several established companies with substantial market shares. It is not likely that AT&T would expend its resources in such a manner. Also, even if AT&T were able to drive other carriers out of the market, it would quickly encounter new entry when it attempted to raise prices to reap monopoly profits. Thus, it would serve no purpose for AT&T to lose money for some period of time with the expectation of making the losses up in the future.[56]

61. While we cannot conclude that the above issues warrant a conclusion that AT&T is dominant in the provision of non-IMTS services, we do recognize that AT&T holds a unique position in

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[54] 85 FCC 2d 1.

[55] While AT&T is a major lessor of facilities used by other non-IMTS providers, we note that many of these providers have constructed their own networks or lease facilities from entities other than AT&T.

[56] While it might be possible for AT&T to raise prices to a level above the competitive level but below the monopoly level and earn excess profits without encouraging entry in the long-run, we do not believe AT&T would attempt such a strategy in an extremely competitive and dynamic market. In addition, we will continue to closely monitor the market and will take remedial action if abuses occur.

the provision of international services. We further recognize that the provision of dominant and non-dominant services within the same corporation raises potential difficulties.[57] Thus, while we find AT&T non-dominant for non-IMTS services, we will require it to file an accounting and cost allocation plan prior to our actually streamlining the regulation of its non-dominant activities. This parallels the requirement we recently set forth in our order allowing AT&T to eliminate the separate subsidiary for Customer Premises Equipment.[58] There we stated, "we recognize the utility of accounting to guard against cross-subsidization by carriers that are providing both regulated and unregulated services and products."[59] We do not believe that it is necessary to impose structural separation to prevent harm to other non-IMTS service providers because of the vigorous and established competition in the non-IMTS market.[60]

62. This accounting and cost allocation plan should be designed to segregate and identify separately the costs and revenues attributed to AT&T's IMTS as opposed to its non-IMTS. We are especially interested in the allocation of joint and common costs between IMTS and non-IMTS activities. AT&T should provide us with a list of all joint and common cost categories that are used to provide IMTS and non-IMTS and the allocation methodology to be employed to assign these costs. We are also concerned that AT&T allocate circuits in old, high cost cables and new, lower cost cables fairly. Similarly, we are concerned that excess cable capacity held by AT&T for only future use not be allocated

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[57] This is in contrast to Comsat, where a separate subsidiary structure is in effect. *See infra*, paragraphs 63–66. *See also*, Communications Satellite Corp., Mimeo No. 7025, released September 13, 1985.

[58] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company, FCC 85–509, released September 30, 1985 [CPE Decision].

[59] *Id.* at n. 105. *See also*, Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry); and Amendment of the Commission's Rules to Provide for Nonregulated Activities of Telephone Carriers (Fifth Report and Order), 49 Fed. Reg. 46,378 (November 26, 1984).

[60] CPE Decision, *supra*, paragraph 36. "Had competition in [the CPE] markets been more firmly established, the benefits we perceived in structural separation would certainly have been smaller. In examining the current state of competition in the CPE market, we conclude, contrary to the assertions of some parties, that competition is vigorous and strong . . . In light of this robustly competitive marketplace, our previous concerns that AT&T would be able to displace competition and reestablish a dominant position in CPE have been greatly reduced."

entirely to IMTS but that there be a reasonable division of costs for these circuits between IMTS and non-IMTS.[61]

3. Comsat

63. Due to Comsat's unique mix of service offerings it is useful to discuss Comsat separately from the other service providers in the international market. Basically, Comsat provides five distinct jurisdictional services: space segment services, multipurpose earth station services, television service, IBS and end-to-end services. Space segment services are provided through the Space Communications Division while the other four services are provided through the competitive subsidiary, Comsat Services Division, Inc.[62] We will discuss each of these offerings.

a. Space Segment

64. Comsat is currently the only provider of INTELSAT space segment capacity. We tentatively concluded in the NPRM that Comsat is dominant in the provision of this service. No party, including Comsat, objected to this finding.

65. We recognize that satellite capacity is generally fungible with submarine cable capacity for most uses and routes. Nonetheless, it is preferred for some service offerings and geographical routes[63] and due to factors such as restoration and diversity, most carriers and administrations prefer to use a mix of cable and satellite facilities.[64] Therefore, for the purposes of this initial deregulatory effort, we will limit our analysis by making the conservative assumption that the space segment is a relevant

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[61] The Common Carrier Bureau will conduct an initial review of the plan, prior to implementing streamlined regulation for AT&T's non-dominant activities. If the Bureau determines that the plan meets the concerns expressed above, it may allow streamlined regulation to take effect. Subsequently, a detailed review will be conducted with an opportunity for interested parties to comment. This is consistent with the procedures adopted in the CPE proceeding. *See CPE* Decision at n. 107.

[62] While not yet actually providing end-to-end services, Comsat was authorized to do so in *Authorized User II* and has stated its intention to enter this market. It appears that Comsat International Communications, Inc. will be the entity providing the bulk of the non-INTELSAT and non-INMARSAT services.

[63] Until fiber optic cables are introduced, satellites are the only cost effective means of transmission for digital services as well as television services. Further, satellites would appear to be the cost effective medium for thin (low density) traffic paths.

[64] We also note that our facidlity loading guidelines guarantee Comsat a definite market share of IMTS traffic. See n. 27, *supra*.

sub-market. Thus, Comsat is dominant for the provision of this service.

b. Multi-purpose Earth Stations

66. In the *NPRM* we tentatively concluded that Comsat is dominant in its provision of multi-purpose earth station services. We affirm that finding here. Comsat is currently the fifty percent owner and operator of the seven multi-purpose earth stations currently operating in the continental U.S., Hawaii and Guam. These are the only earth stations of this type currently in service. It is from these earth stations that carriers generally connect with INTELSAT satellites to obtain international satellite service. While it is possible, since our *Earth Station Ownership* decision, for other entities to construct new multipurpose earth stations, this does not appear to be the direction that the market is taking.[65] Thus, we find that multi-purpose earth station services have no easily substitutable services, that this service is a distinct product market, and that Comsat is presently dominant in the provision of this service.

c. Television Service

67. In the *NPRM* we tentatively concluded that Comsat is non-dominant in the provision of television service. After reviewing the pleadings pertaining to this issue we now believe that Comsat is dominant in its provision of this service.[66] Comsat is presently the only provider of television service and has the market power to charge monopoly prices for this service. Thus, it is reasonable to classify Comsat as dominant for this service. We do recognize, however, that the market for the provision of television service appears to be on the verge of expansion. A number of carriers have been recently authorized to construct TV-only earth stations.[67] Further, as fiber optic submarine cables with the capacity to carry television signals are introduced, users desiring television service will have a wider variety of service

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[65] Under the Comsat and AT&T Memorandum of Understanding signed June 3, 1985, Comsat will sell its interest in the multi-purpose earth stations to AT&T by year-end 1987. When the sale is completed, Comsat would no longer be dominant in the provision of this service. We would expect, however, that AT&T would then be dominant in its provision of multi-purpose earth station services unless competition for the provision of this service develops. We will make a determination on this issue when considering the transfer application.

[66] See Comments of SIN and joint comments of ABC, NBC and CBS.

[67] We have also authorized a number of IBS/TV earth stations. Most of these, however, are being built so as to only receive IBS.

options available.[68] Thus, we expect vigorous competition to develop in this market in the not too distant future. Still, until these plans for alternative sources of television service materialize, we must retain full regulatory oversight to prevent Comsat from exploiting its current position as the only provider of television service. For this reason, it is necessary to classify Comsat as dominant in the provision of this service.

d. IBS and End-to-End Services

68. We affirm our tentative conclusion that Comsat is non-dominant in its provision of IBS and end-to-end services. We find the arguments raised by those parties opposing this finding to be unconvincing. The mere fact that a service is in its developmental stages is not sufficient reason, by itself, to find that one carrier is dominant.[69] In any event, IBS is clearly substitutable with other non-IMTS private line data services so that there is no reason to treat any IBS service provider differently. Comsat has no special advantage over other carriers in the provision of this non-IMTS service that would justify a finding of dominance.[70] We also find no merit in a number of parties' arguments that the Comsat name and its PTT relations give it an unfair advantage over its competitors. Many of the other non-IMTS service providers are well-established in the marketplace and have well established PTT relations.

69. Most of those parties opposed to our finding Comsat non-dominant for its competitive service offerings expressed concern over Comsat's ability to engage in anticompetitive behavior due to the fact that it also engages in activities in which it possesses market power, especially its monopoly provision of space segment. We believe, however, that sufficient structural and administrative safeguards are currently in place to minimize any dangers that might surface from the streamlining of Comsat's competitive activities. These safeguards include the structural separation of Comsat's competitive and non-competitive jurisdictional activities as well as extensive financial reporting requirements.[71]

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[68] Fiber optic submarine cables are currently being planned for the Pacific Ocean, Atlantic Ocean and the Caribbean.

[69] *See*, American Satellite Corp., 55 FCC 2d 1, 2 (1975).

[70] For example, IRI was the first carrier authorized to provide IBS service and the first carrier to construct an IBS earth station.

[71] The structural separation of Comsat activities has developed in a series of Commission orders and has minimized the possibility of cross-subsidization from Comsat's dominant to its non-dominant activities. Further orders provide

70. We do not believe that the Comsat subsidiary offering competitive services has any substantial advantage over any other carrier offering the same or similar services. Comsat International must take space segment from Comsat pursuant to the same tariff under which other carriers take space segment. Further, contrary to the arguments raised by some commenters, Comsat International has no advantage over other carriers merely because Comsat is the U.S. representative to INTELSAT. Comsat must treat Comsat International as it does any other carrier with respect to information received from INTELSAT. Thus, any information from INTELSAT available to Comsat International is available at the same time to all other carriers. To the extent that some benefit may flow to the subsidiary because of its association with the parent corporation, we do not believe that any such indirect benefit warrants classifying the subsidiary as dominant for IBS and other end-to-end services.

71. Finally, the Commission requires Comsat to submit monthly and yearly financial statements as well as a consolidated capitalization plan. In these filings Comsat must not only submit information by subsidiary but it also must treat the various non-jurisdictional activities in Comsat International separately.[72] Thus, the Commission will be in a position to detect any attempts on the part of Comsat at cross-subsidization or other anticompetitive behavior.[73] We therefore find Comsat non-dominant in the provision of competitive non-IMTS services (IBS and end-to-end services).

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for separate accounting treatment for monopoly and competitive services and assure arms-length dealings between the competitive and space segment divisions. Communications Satellite Corp., Mimeo No. 7025, released September 13, 1985; Changes in the Corporate Structure and Operations of the Communication Satellite Corporation, 90 FCC 2d 1159 (1982) (First Structure Order), *recon.*, 93 FCC 2d 701 (1983) (First Structure Recon.); Second Memorandum Opinion and Order, 97 FCC 2d 145 (1984) (Second Structure Order), *recon.*, 99 FCC 2d 1040 (1984) (Second Structure Recon.); Report and Order, FCC 85-178, 50 Fed. Reg. 18,304 (April 30, 1985) (Final Structure Order).

[72] Thus, Comsat International has separate line items in all of its reports for multi-purpose earth stations, IBS and INTELSAT jurisdictional activities. We recognize that television service, which we find to be a dominant service offering, is not currently broken out in Comsat's reports. However, we expect that date from television services will be reported under the category of multi-purpose earth station services. As both are dominant activities there is no danger of cross-subsidization.

[73] A number of parties cited past Commission statements ensuring our continued oversight of Comsat activities. We intend to continue our oversight of Comsat's monopoly and dominant services. However, streamlined regulation will apply to those services provided by Comsat which are offered in a competitive environment.

4. Foreign Owned Carriers

72. In the *NPRM* we proposed maintaining full regulation for all foreign owned carriers providing international service.[74] That is, all foreign owned carriers would be dominant for all services to all foreign points. We continue to have concerns about reciprocity (market entry) as well as market distortions (unequal interconnection and discrimination) that may occur due to foreign owned carriers operating in concern with their parent organization. Therefore, as a threshold matter, all foreign owned carriers will be considered dominant. The most efficient was to encourage the granting of operating agreements and to discourage market distortions is to classify all foreign owned carriers as dominant. This classification, coupled with the monitoring of the operating practices of foreign owned carriers and the direct conditioning of specific Section 214 authorizations on the granting of operating agreements and on the filing of specific traffic and revenue data should assure that our policy goals are met.[75]

73. We believe that it is in the public interest to closely monitor foreign owned carriers' operating arrangements and tariffs to ensure that markets are not manipulated in such a way that harms U.S. based carriers, U.S. interests and U.S. users. Thus, we will condition Section 214 authorizations granted to

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[74] We proposed in the *NPRM* to define foreign owned carriers as any entity that would be unable to hold a station license under Section 310 of the Communications Act. The Section 310 guidelines present several ownership and nationality scenarios. To avoid confusion, we will adopt here a simpler and we believe a more useful ownership test to determine if a carrier is foreign owned for the purposes of implementing international competitive carrier policies. Because of the importance we place on reciprocity and fairness, a U.S. carrier which is over 15% directly or indirectly foreign owned by a foreign telecommunications entity or on whose board of directors an employee, agent or representative of a foreign telecommunications entity sits shall be considered to be foreign owned for the purposes of implementing international competitive carrier policies. We certainly recognize that some large investments may be passive and in those instances, or for other good public policy reasons, waivers may be granted. We may implement this waiver policy under our puiblic interest standard on a carrier-by-carrier or country-by-country basis. In addition, we recognize that some debt holdings or small equity investments may not be passive and, thus, warrant the imposition of dominant carrier status even if the foreign ownership requirements are not met. On our own notion or through the filings of interested parties we may determine that full regulatory oversight best serves the public interest and is consistent with our policy to obtain reciprocity and fairness.

[75] TDX argues that it should be considered non-dominant to the United Kingdom. We are not equipped, however, to consider the domestic markets of foreign countries. Thus, we find it sufficient here that TDX's parent is based in the United Kingdom and operates a carrier (Mercury) in the U.K. We therefore find TDX to be dominant.

foreign owned carriers to require these entities to submit quarterly country-by-country revenue and traffic reports for all the countries which they provide service. This will allow us to monitor transisting, refiling and return flow traffic patterns.[76] Further, we remain concerned about the opening of foreign markets to U.S. carriers. Thus, we will also consider, on a case-by-case basis, attaching conditions on Section 214 certificates filed by foreign owned carriers relating to reciprocal entry by additional U.S. carriers. Under these requirements we could, for example, condition an authorization granted to a foreign owned carrier to provide service between the U.S. and the jurisdiction of its parent or some other jurisdiction within its parent's control on the granting of operating agreements to additional U.S. carriers for a particular service and traffic path.

E. Implementation of International Competitive Carrier

74. In the *NPRM* we proposed streamlining certain tariff and facilities licensing regulations for non-dominant international carriers. With the exception of a few adjustments we adopt the proposals as contained in the *NPRM*.

75. A number of parties argued that we should move directly to forbearance for non-dominant carriers based upon our domestic experiences with *Competitive Carrier*. We still believe, however, that streamlining is a better first step in this dynamic and changing market. As we gain experience with streamlined regulation and as the new international market structure evolves further, we will be in a better position to evaluate additional streamlining and forbearance options.

1. Tariff Requirements

76. In the *NPRM* we tentatively proposed to subject the tariffs of non-dominant carriers to the streamlined rules developed in the domestic *Competitive Carrier* proceedings. Specifically, we proposed that tariffs filed by carriers for services for which they have been found to be non-dominant are presumptively *lawful*. Further, only fourteen days advance notice would be required before tariffs

[76] Foreign owned carriers would file data on all U.S. outbound traffic carried, indicating all terminating points as well as data on all U.S. inbound traffic, indicating all originating points. The Section 214 authorization would also be conditioned on the foreign owned carriers filing any ancillary operating agreements entered into by themselves or their parents/affiliates that affect traffic and revenue flows to or from the United States. These quarterly reports would be filed within 90 days from the end of the calendar quarter.

for non-dominant services take effect and Section 61.38 economic and cost support data would not be required to support these tariffs. Finally, we proposed that the standard of review to suspend tariffs for non-dominant services, as in the domestic market, would be whether the injury to competition which would result if the tariff were allowed to take effect is greater than the harm to the public from not allowing the tariff to take effect. The burden of proof will be on the party asking that the tariff not be allowed to take effect.

77. No party had any objections to our proposals for streamlining the tariffs of non-dominant carriers. Thus, we adopt the streamlined tariff requirements as contained in the *Notice*. TRT argued that we should impose a RCCA. We do not believe this to be necessary. However, we do caution all carriers to which the RCCA applies, that this proceeding does not in any way change their interconnection and tariffing responsibilities under that Act.

2. Facilities Licensing Requirements

78. In the *NPRM* we proposed streamlining the facilities licensing requirements for non-dominant carriers. Specifically, we proposed that once a non-dominant carrier obtained initial Section 63.01 certification to provide service to a specific country that carrier would not be required to file further applications to add circuits or change facilities to provide services within that same product market to serve that country. Rather, a non-dominant carrier would merely file notification of the added circuitry on a country-by-country basis. We adopt this proposal here.[77]

79. The streamlining of the Section 214 facility authorization process will not adversely affect our oversight, monitoring or facilities planning responsibilities. In fact, we now grant a variety of blanket certifications. International carriers provide a wide range of detailed information that enables us to carry out our responsibilities efficiently and effectively. This includes circuit status reports, activation/usage plans, Section 43.61 data (*e.g.*, revenues, messages and minutes) and Section 43.52 documents (*e.g.*, contracts and operating agreements). Additionally, interna-

[77] These semi-annual filings will be filed on a consolidated basis on February 1 (covering facilities over which service was initiated during the preceding July 1 to December 31 period) and August 1 (covering facilities over which service was initiated during the preceding January 1 to June 30 period) of each year.

tional carriers and the Commission continue to participate in the facilities planning process.

80. Thus, U.S. carriers not found to be dominant for the provision of a specific product will be required only to file an initial application under Section 63.01 in order to provide such a product to an additional geographic market or to initially provide such a product to an overseas market. Separate Section 63.01 applications will be required to initiate IMTS, non-IMTS, television, space segment or multi-purpose earth station services. In the application for certification to initiate service to a given country a carrier should include adequate information for us to make a finding as to the issue of non-dominance. After obtaining certification to provide a service to a particular geographic market as a non-dominant carrier, the carrier will then only be required to report circuit additions on a semi-annual basis. In order to facilitate our monitoring of the international markets when reporting circuit additions, carriers should note the specific services for which the circuits are being used (*e.g.*, IMTS, telex, IBS, private line, etc.) as well as the country served.[78]

81. Due to the size and scope of the facilities, even non-dominant carriers will be required to file applications to participate in the construction of all major facility projects such as transoceanic submarine cables. Further, non-dominant international carriers will also be required to file applications to acquire capacity from any future private cable or satellite sources. Authorizations on these projects are necessary for our long-range facilities planning responsibility as well as to assure the compliance with any conditions placed on private systems.[79]

82. Two user associations, ADAPSO and ICA, commented at some length on requirements to discontinue service. Implicit in the *NPRM* was a notice requirement of fourteen days to discontinue service, the same as the domestic requirement. According to these parties the process of finding substitute international private line service can take three months or more due to the need to co-ordinate service between a PTT, a U.S.

[78] At the present time the monthly circuit status reports of some carriers are treated as confidential for several months. Since we believe that circuit additions should be public as they are for domestic non-dominant carriers, non-dominant international carriers are required to file their semi-annual circuit addition data separately from their monthly circuit status reports. Also, any carriers not currently filing monthly circuit status reports will also be required to file the semi-annual circuit addition information.

[79] This is consistent with our recent policy statements concerning private submarine cables and separate satellite systems. *See*, *Tel-Optik*, *Separate Systems*, *supra*, at paragraph 127.

international carrrier and a domestic carrier. Thus, ADAPSO proposed a 120 day notice requirement to discontinue service. No carrier objected to this proposal.

83. We recognize that differences between the international and domestic markets exist. Due to this fact, regulations must be tailored to fit the specific market circumstances. It is important that users are assured that they will not encounter service interruptions. Thus, we will require non-dominant carriers to give 120 days notice prior to discontinuing service.

III. Conclusion

84. Our experience with *Competitive Carrier* in the domestic market has shown that we can successfully eliminate unnecessary and burdensome regulations, benefitting both carriers and users. Given the dynamic growth in the international telecommunications market, it is now proper to increasingly rely on market forces and to streamline the regulations for non-dominant carriers. This will allow carriers to operate more efficiently and will allow them to better respond to customers needs.

85. Our analysis leads us to conclude that international telecommunications are properly divided into IMTS and non-IMTS product markets. Exceptions to this general market division are INTELSAT space segment, multi-purpose earth station services and television services which each constitute separate markets. Further, we conclude that each country represents a separate geographic market. Based upon these market definitions we conclude that only AT&T and the primary service providers of IMTS for noncontiguous domestic points are dominant for the provision of IMTS service. We further conclude that no carrier presently providing non-IMTS service is dominant. The only exception to these general findings are foreign owned carriers who are dominant for all services to countries where they, their parent or some affiliate operate or have a franchise. We find Comsat to be dominant in the provision of INTELSAT space segment, television service and multi-purpose earth station services and non-dominant in the provision of IBS and other end-to-end services.

IV. Ordering Clauses

86. Accordingly IT IS ORDERED pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403 and 404 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 218, 220, 403, and 404,

the policies, rules, and requirements set forth herein ARE ADOPTED.

87. IT IS FURTHER ORDERED that the motion for leave to file late comments filed by TRT Telecommunications Corporation IS GRANTED.

88. IT IS FURTHER ORDERED that the motion for leave to file late reply comments filed by International Relay, Inc. IS GRANTED.

89. IT IS FURTHER ORDERED that the additional pleadings filed by The Hawaiian Telephone Company ARE ACCEPTED.

90. IT IS FURTHER ORDERED that the American Telephone and Telegraph Company, if it desires to provide non-IMTS services on a streamlined basis, shall file a cost allocation and accounting plan as set forth herein.

91. IT IS FURTHER ORDERED that § 63.09 of the rules, as set forth in Appendix A IS ADOPTED. This document establishes *December 23, 1985* as the effective date.

92. IT IS FURTHER ORDERED that those carriers identified herein as providing non-dominant international services, shall apply the streamlined regulations identified herein to such services thirty days after publication of this order in the Federal Register.

93. IT IS FURTHER ORDERED that applications on file after the time period specified in the preceeding paragraph which under these rules would not have to be filed may be dismissed by the staff.

94. IT IS FURTHER ORDERED that CC Docket No. 85-107 remain open for additional proceedings upon further order of the Commission.

95. IT IS FURTHER ORDERED that the staff is delegated authority to prescribe a reporting format for foreign owned carriers if such action appears necessary.

96. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause the Report and Order to be published in the Federal Register and shall mail a copy of this decision to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Section 63.09 is added to 47 CFR Part 63 to read as follows:

§ 63.09 Special procedures for non-dominant international services.

(a) Any party that would be a non-dominant international communications service provider must file an application pursuant to § 63.01 for certification to initiate that service to any geographic market or to construct, acquire or operate lines in any new major common carrier facility project or to acquire or operate any facility offering capacity on a non-common carrier basis.

(b) Any party certified to provide non-dominant international communications services to a particular geographic market shall report circuit additions on a semi-annual basis. Circuit additions should indicate the specific services provided (*e.g.* IMTS or telex) and the country served. These reports shall be filed on a consolidated basis on February 1 (covering facilities over which service was initiated during the preceding July 1 to December 31 period) and August 1 (covering facilities over which service was initiated during the preceding January 1 to June 30 period) of each year.

(c) Any party certified to provide non-dominant international communications services to a particular geographic market is required to give 120 days notice prior to discontinuing service to that geographic market.

Common Carrier, Rate Structure, Inquiry

Petitions for further reconsideration considered and denied. —*MTS/WATS Market Structure*
CC Docket No. 78-72, Phase I

FCC 85-551

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
MTS and WATS Market Structure	CC Docket No. 78-72 Phase I

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1985; Released: October 23, 1985

BY THE COMMISSION: COMMISSIONER DAWSON DISSENTING.

I. Introduction

1. The *Third Report and Order* in this docket (*Access Charge Order*)[1] established comprehensive rules governing the process by which local telephone companies recover the costs of their facilities and services used in the origination or termination of interstate and foreign communications.[2] These charges are assessed through access tariffs filed by the exchange carriers with

[1] MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983) (hereinafter *Access Charge Order*), *modified on reconsideration*, 97 FCC 2d 682 (1983) (hereinafter *First, Reconsideration Order*), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (hereinafter *Second Reconsideration Order*), *aff'd in principal part and remanded in part, Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC.*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1224, 105 S.Ct. 1225 (1985), *modified on further reconsideration*, 49 Fed. Reg. 46, 383 (1984), 50 Fed. Reg. 18, 249 (April 30, 1985) (hereinafter *Third Reconsideration Order*), *appeal pending, U.S. Telephone, Inc. v. FCC*, Nos. 84-1115 and 85-1386 (D.C. Cir., filed March 23, 1984 and June 24, 1985).

[2] The Commission's separations procedures govern the apportionment of local telephone company investment and expense between the interstate and the intrastate jurisdictions and are set out in Part 67 of the Commission's Rules. *See* 47 C. F. R. §§67.1-67.701 (1984).

this Commission and replace a variety of previous compensation mechanisms. In adopting this access charge plan, we sought to achieve a balance among the following four policy objectives: (1) preservation of universal service; (2) elimination of unreasonable discrimination of preferences among rates for interstate services; (3) efficient use of the local network; and (4) prevention of uneconomic bypass.[3]

2. In the access charge plan, we also sought to maximize the oppportunities for full and fair competition among interexchange carriers during the transition to "equal access," when the inequalities between the interconnection options offered AT&T and the other interexchange common carriers (OCCs) will be eliminated.[4] We did this in part by providing that AT&T would pay a premium access charge during this transition because the access to the local exchange it receives is superior to that available to the OCCs. This premium charge was to be phased out at approximately the same rate as equal access was phased in.

3. This Commission has subsequently amended these "access charge" rules in three orders on reconsideration. In each instance, we reaffirmed our commitment to the objectives set out in the *Access Charge Order*, while modifying in certain respects the means we had selected to achieve those objectives. In the *First Reconsideration Order*, we provided that the lump-sum premium charge of AT&T would be replaced with a 35 percent differential in the per minute charges for the carrier common line element assessed for premium and non-premium access.[5] In the *Second Reconsideration Order*, we provided that the differential between

[3] *See Access Charge Order* at para. 122.

[4] The MFJ requires that the divested Bell Operating Companies (BOCs) provide all interexchange carriers with local exchange access "on an unbundled tariffed basis that is equal in type, quality and price to that provided to AT&T and its affiliates." *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982) ("*Modification of Final Judgment*" or "*MFJ*"), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). GTE is required to implement equal access pursuant to a Consent Decree entered into with the Department of Justice to settle an antitrust challenge to GTE's acquisition of Sprint. *United States v. GTE Corporation*, 603 F.Supp. 730 (D.D.C. 1984). The remaining independent telephone companies are required to implement equal access in certain end offices pursuant to our order in Phase III of this docket. MTS and WATS Market Structure, CC Docket 78-72, Phase III, Report and Order, 50 Fed. Reg. 15,547 (April 19, 1985).

[5] We also modified the original access charge plan by ordering: (1) a more gradual transition to subscriber line charges for residential and Centrex-CO subscribers; (2) establishment of a surcharge on private lines with the capacity to "leak" interstate traffic into the local exchange; and (3) certain other changes in the distribution of access costs among users of access services. *See* 97 FCC 2d 682 (1983).

premium and non-premium access charges would be increased to 55 percent and applied to all access elements and that charges for non-premium access be assessed on a flat-rate, per line basis[6] for interexchange carriers providing MTS-WATS equivalent services.[7] In particular, we were concerned that usage-based access charges would result in a sudden and substantial increase in costs for those OCCs with above-average usage per line. We determined that 9,000 minutes per line was a reasonable estimate of average OCC usage and should be used to compute the monthly per line charge.[8] We also provided that non-premium rates would be phased-out on an end-office-by-end-office basis as equal access became available.

4. We addressed the issues raised in the petitions seeking reconsideration of the *Second Reconsideration Order* in two parts.

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[6] In making this determination, we used the rates established in the Exchange Network Facilities for Interexchange Access (ENFIA) tariffs as a benchmark. The ENFIA tariffs were a result of an agreement between the pre-divestiture AT&T and some of the OCCs that governed the charges OCCs would pay for their use of local exchange facilities in completing their customers' interstate calls. The agreement constituted an interim measure to bridge the gap between the court decisions permitting the OCCs to offer services in direct competition with MTS and WATS, *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Dir. 1977), *cert. denied*, 434 U.S. 1040 (1978) *motion for an order directing compliance with the mandate granted*, 580 F.2d 590 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 980 (1978), and our determination in this proceeding of an appropriate access charge structure for all interexchange carriers. *See* Exchange Network Facilities (ENFIA), Memorandum Opinion and Order, 71 FCC 2d 440 (1979). Thus, the system of access charges we have provided in the Part 69 rules was intended to supplant the ENFIA rate structure. *See Second Reconsideration Order* at paras. 51-55.

[7] In the *Second Reconsideration Order*, we further modified the access charge plan by deferring customer line charges for residential and single-line business subscribers pending further examination of various issues concerning the implementation of such charges. We also addressed the application of access charges to, *inter alia*, the closed end of WATS lines, the open end of foreign exchange lines (FX) lines, and "leaky" private lines. 97 FCC 2d 834 (1984). We subsequently referred a number of access charge issues to the existing Federal-State Joint Board in CC Docket No. 80-286. On November 15, 1984, the Joint Board adopted a recommendation for several modifications to our existing plan, including the implementation of subscriber line charges for residential and single-line business subscribers of $1.00 per month beginning June 1, 1985, with an increase to $2.00 per month beginning June 1, 1986. MTS and WATS Market Structure and Amendment of Part 67, Recommended Decision and Order, 49 Fed. Reg. 48,325 (1984). On December 19, 1984, we adopted the Joint Board's recommendations with a few minor clarifications and changes. MTS and WATS Market Structure and Amendment of Part 67, Decision and Order, 50 Fed. Reg. 939 (1985). The $1.00 charge for residential and single-line subscribers did, in fact, go into effect on June 1, 1985.

[8] The non-premium per line charge is obtained by multiplying a hypothetical premium charge per access minute for each relevant access element by 4,050 (45 percent of 9000) minutes. *See Second Reconsideration Order* at para. 87.

In the first part of the *Third Reconsideration Order*, we addressed the assignment of Category 5 station equipment costs to the special access element and adopted an amendment to the Part 69 rules. In the second part of the *Third Reconsideration Order*, we concluded that the flat-rate charge for non-premium access for OCCs should be replaced with usage-sensitive charges, effective January 1, 1986. With the exception of these modifications, (and several minor perfecting amendments to the Part 69 rules), we reaffirmed the provisions of our access charge plan adopted in the *Second Reconsideration Order*.

5. In response to the *Third Reconsideration Order*, several parties have filed for further reconsideration of our decisions in this proceeding.[9] The issues raised in this fourth reconsideration round concern: (1) the implementation of usage-based charges for non-premium access; (2) LATA-wide access for terminating Feature Group A (FGA); and (3) the phase-out of the non-premium discount on an end-office-by-end-office basis. In this *Order*, we affirm our decision in the *Third Reconsideration Order* to eliminate flat-rate charges for non-premium access services and require that these services be billed on a usage-sensitive basis. Furthermore, we dismiss as untimely those petitions asking us to modify our access charge rules to require exchange carriers to provide LATA-wide access for terminating, non-premium FGA traffic and to provide for a phase-out of the non-premium discount on other than an end-office-by-end-office basis.

II. Summary of Comments

A. Usage-based Charges for Non-premium Access

6. GTE Sprint Communications Corporation (GTE Sprint), MCI Telecommunications Corporation (MCI), Satellite Business Systems (SBS) and United States Transmission Systems, Inc. (USTS) seek reversal of our decision to require usage-based charges for FGA access beginning January 1, 1986. These OCCs argue that this action will increase their costs and that rather than fostering competition in the interexchange services marketplace, as suggested by the Commission, this change will have a negative impact on the OCCs' ability to compete with AT&T. GTE Sprint states that no OCC large or small, protested the continued use of

[9] The parties filing petitions for reconsideration, oppositions, and reply comments are listed in Appendix A.

flat charges for FGA access.[10] MCI argues that Lexitel, in a petition the Commission cited in the *Third Reconsideration Order* in support of its decision, did not request that flat-rate FGA be eliminated, but only that the availability of a usage-based FGA option for OCCs be affirmed.[11] SBS contends that the Commission did not adequately explore alternative possibilities to address the problems it identified with the flat-rate charge, such as allowing the OCCs the option of choosing either flat or usage-based charges.[12] USTS agrees with SBS and argues that providing the OCCs with such an option would fully address the needs of small carriers, while allowing the larger carriers with high, per line usage levels to continue to benefit from the flat rate. It further contends that the Commission could eliminate potential abuses by restricting an OCC to either flat-rate or usage-based charges for all its lines in a LATA or a local exchange area.[13]

7. MCI and SBS assert that the flat-rate charge for FGA reflects the rate structure that has been in place since the original ENFIA agreement in 1976 and that the OCCs have designed their networks on the assumption that non-premium access will be priced on a flat-rate basis.[14] MCI also asserts that there is no record evidence to support the Commission's concerns about the potential role of the flat-rate charge as a barrier to entry.[15] It further argues that eliminating the flat rate will result in higher costs for those OCCs that have the best chance of surviving the transition to equal access.[16] USTS states that it has scaled its operations to achieve above-average access line loadings and the abrupt change to a usage-based structure will result in a sixty percent increase in its FGA access costs.[17] Finally, GTE Sprint argues that there is an insufficient record to support the Commission's conclusion that measurement capabilities are no longer a barrier to the implementation of usage-based charges for FGA and FGB services.[18]

8. American Telephone and Telegraph Company (AT&T) and several Bell Operating Companies (BOCs)[19] oppose the OCCs'

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[10] GTE Sprint Petition at 3-4.
[11] MCI Petition at 8.
[12] SBS Petition at 4.
[13] USTS Petition at 5-6.
[14] SBS Petition at 2-3; MCI Petition at 6.
[15] MCI Petition at 6-7.
[16] *Id.* at 8.
[17] USTS Petition at 3.
[18] GTE Sprint Petition at 8-10.
[19] Ameritech, Bell Atlantic, NYNEX and Pacific Bell filed oppositions to the OCCs' petitions.

petitions. AT&T argues that the OCC's attack on the Commission's decision to implement usage-based charges for FGA access is merely an attempt to gain an unfair competitive advantage by expanding the differential for non-premium access.[20] AT&T argues that, contrary to the contentions of some OCCs, the Commission has not altered the discount for non-premium access by eliminating the flat rate, but simply has made the discount equal for all OCCs based on actual usage.[21] AT&T asserts that this is not a shift in regulatory policy, but a conformance to the clearly stated goal of nondiscrimination.[22] AT&T states that, as GTE Sprint recognizes, allowing OCCs to order non-premium FGA on either a flat rate or usage-sensitive basis, at their option, would result in a discount to the OCCs greater than the 55 percent established by this Commission.[23]

9. The BOCs contend that the flat-rate structure has encouraged inefficient use of the local network, since it permits the OCCs to increase their minutes of use per line, and thereby impose additional costs on the local exchange carriers, without requiring the payment of any additional charges. They argue that this is not consistent with the Commission's general policy of requiring cost-based rates. Ameritech argues that the petitioning OCCs seek to extend the artificial advantage that comes with a choice of rate structures and that the Commission's duty is to protect the public interest, not the special advantages of a few access customers.[24] In addition, NYNEX asserts that a usage-based structure is more consistent with the Commission's efforts to promote greater competition in the interexchange marketplace.[25]

10. Pacific Bell contends that whatever the level of the discount, it should be applied evenly to all OCCs and that such equality of treatment cannot be achieved with a flat rate.[26] Pacific Bell adds that it has measurement capabilities in 95% of its FGA offices.[27] Ameritech states that the nine-month interim period allows sufficient time for the OCCs to perform desired reconfigurations and adds that Illinois Bell is able to measure

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[20] AT&T Opposition at 1-2.
[21] AT&T Opposition at 4.
[22] *Id.* at 5.
[23] *Id.* at 8 citing GTE Sprint's Petition at 7.
[24] Ameritech Opposition at 5.
[25] NYNEX Opposition at 5.
[26] Pacific Bell Opposition at 4.
[27] *Id.* at 4-5.

usage on approximately 97% of all its FGA lines.[28]

11. In reply to these oppositions, MCI states that a comprehensive look at the transition to equal access, including reconsideration of the decision to eliminate the flat-rate option for FGA, is necessary if the goals the Commission set forth in this docket are to be accomplished.[29] GTE Sprint argues that the record still lacks adequate information on the extent of measurement capabilities in exchange carrier end offices.[30] GTE Sprint contends that the Commission's conclusion that such capability is widespread is inconsistent with the fact that NECA's interstate tariff and at least 42 BOC intrastate access tariffs contain provisions for assumed usage in instances where usage cannot be measured. GTE Sprint asserts that the Commission should initiate an additional proceeding to gather information from the exchange carriers about their ability to measure FGA usage to determine whether the elimination of flat-rate charges will force them to invest in measuring equipment that will become useless with the implementation of equal access. Finally, GTE Sprint argues that the BOCs have not explained why a usage-based system of access charges is more cost-based than a flat-rate system, since most access costs are non-traffic sensitive (NTS) and have no relation to an OCC's minutes of use.[31]

B. LATA-wide Access For Terminating FGA

12. Ad Hoc Telecommunications Users Committee (Ad Hoc) and MCI request that we reconsider our decision that the tariff process is the proper forum for the resolution of the issue of LATA-wide access for terminating non-premium FGA traffic. Ad Hoc believes that the Commission should institute a rulemaking to resolve the issue of LATA-wide access for FGA and clarify that the *Third Reconsideration Order* does not permit exchange carrier to impose intrastate toll charges to carry OCC interstate traffic to distant points in a LATA.[32] MCI asserts that LATA-wide access is a tariff issue only to the extent that the appropriate local transport rate level is concerned.[33] Aeronautical Radio, Inc. (ARINC) and the Alternative Carrier Telecommunications Association (ACTA) support these petitions. ARINC be-

[28] Ameritech Opposition at 6-8.
[29] MCI Reply Comments at 9.
[30] GTE Sprint Reply at 2-4.
[31] *Id.* at 4.
[32] Ad Hoc Petition at 1-2.
[33] MCI Petition at 2-5.

lieves that the Commission should establish an appropriate and uniform rate structure for FGA transport charges and argues that the tariff review process would only permit consideration of these charges on a piecemeal basis.[34]

13. The National Exchange Carrier Association (NECA), the Southern New England Telephone (SNET), and NYNEX oppose reconsideration of our decision on LATA-wide access for terminating FGA. These parties agree with the Commission's determination that the tariff process is the appropriate forum for addressing this issue. NECA and NYNEX argue that Ad Hoc's concern about the potential for exchange carrier double recovery is clearly unfounded. NECA and NYNEX point out that if the service area associated with the provision of terminating FGA is defined as the local calling area, only those costs associated with facilities used to transport the call within the local calling area are assigned to the interstate jurisdiction under Part 67.[35] NECA and SNET argue that to the extent an exchange carrier cannot identify jurisdictional usage of FGA access arrangements, customers have an incentive to engage in tariff shopping to achieve a lower rate.[36] SNET adds that it has experienced attempts by large customers to purchase the lower priced interstate FGA lines as replacements for intrastate services.[37] And SNET states that, in any event, Ad Hoc's petition does not provide any new information that was not already considered in the Commission's decision on FGA LATA-wide access.[38]

14. MCI replies that the Commission's rules do not allow the application of intrastate toll charges to interstate FGA traffic.[39] Ad Hoc added that it is unaware of any cost support data showing that FGA rates have been reduced by deducting from the local transport charges those costs that are associated with transporting a call outside of the local calling area.[40] Ad Hoc argues that, to the extent an exchange carrier attempted to differentiate transport costs in this manner, it would be in violation of Commission and court rulings.[41] Ad Hoc contends that the opponents of its petition cannot justify surcharging FGA service with intrastate toll charges and that its petition should be

[34] ARINC Comments at 4-5.
[35] NECA Opposition at 2; NYNEX Opposition at 6.
[36] NECA Opposition at 2; SNET Opposition at 5.
[37] SNET Opposition at 5.
[38] SNET Opposition at 1-2.
[39] MCI Reply Comments at 5-6.
[40] Ad Hoc Reply Comments (June 13, 1985) at 2-3.
[41] *Id.* at 3-4.

granted to assure that FGA charges are cost supported and not unlawfully discriminatory.[42]

C. Phase-Out of the Non-Premium Discount on an End-Office Basis

15. Lexitel requests reconsideration of the Commission's decision to phase-out the non-premium discount when Feature Group D (FGD) becomes available in an individual end office. Lexitel asserts that based on actual experience with end-office conversion procedures, it has become apparent that the end-office-by-end-office implementation of FGD and the related presubscription procedures utilized by the exchange carriers are not producing fair opportunities for interexchange competition.[43] Lexitel believes that FGD deployment and the application of premium rates should be related to LATAs or markets, and not to end offices. Lexitel further contends that even when FGD is implemented, it is not equal access for certain services, such as 800 service.

16. AT&T and several BOCs[44] oppose Lexitel's petition. AT&T argues that the Commission already has rejected the requests of several OCCs, including Lexitel, to abandon the end-office approach to phasing out the discount.[45] AT&T contends that Lexitel's present request is repetitious and does not present new or unique circumstances that warrant reconsideration. AT&T adds that, contrary to Lexitel's assertion, the so-called "NXX-Plan" will allow all interexchange carriers to provide 800 service.[46] Bell Atlantic states that its current equal access implementation plans are entirely consistent with the Commission's objectives and do not provide any justification for further modifications to the discount rate structure.[47] NYNEX points out that many of the issues raised by Lexitel have also been raised by four OCCs in a Joint Petition for Expedited Rulemaking on the status of competition in the interLATA market and asserts that these issues would be more appropriately addressed in that proceeding.[48] Pacific Bell argues that once equal access is available, there

[42] Ad Hoc Reply Comments (July 18, 1985) at 3-7.
[43] Lexitel Petition at 2-13.
[44] Bell Atlantic, NYNEX and Pacific Bell.
[45] AT&T Opposition at 12-14.
[46] *Id.* at 12-14.
[47] Bell Atlantic Opposition at 3.
[48] NYNEX Opposition at 4.

is no justification for delaying the application of premium rates.

17. Lexitel replies that factual information obtained by the Commission subsequent to the adoption of a decision should be considered in determining whether the original decision was proper.[49] In this instance, Lexitel argues that, while its petition is technically untimely, the actual experience with the FGD conversion process demonstrates that the assumptions underlying the non-premium access phase-out need to be reconsidered.[50]

III. Discussion

A. Usage-Based Charges for Non-Premium Access

18. In this proceeding we have considered at length what the appropriate level and rate structure should be for the charges that OCCs pay for non-premium access in end offices not yet converted to equal access.[51] In the *Third Reconsideration Order*, we determined that the establishment of usage-based charges for non-premium access was necessary to avoid any unreasonable discrimination against smaller, newer OCCs whose average usage levels are below the monthly, per line figure of 9,000 minutes of use (MOU) on which the flat-rate charge is based. We also provided for a transition period for the establishment of the new rate structure for non-premium access, by directing that the present rate structure remain in effect through the end of this year. In this *Order*, we reaffirm those decisions.

19. A number of larger OCCs assert that our concerns about small OCCs are misplaced, as evidenced by the lack of opposition from these latter carriers to the continued use of flat charges for FGA access. However, Lexitel, TDX, and ATE—all relatively small OCCs—sought Commission action clarifying that they could obtain non-premium FGA access lines on a usage-sensitive basis.[52] These carriers asserted that their ability to compete in the interexchange marketplace would be seriously impaired if they were required to purchase non-premium access on a flat-rate basis.

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[49] Lexitel Reply Comments at 2.

[50] Lexitel subsequently filed a motion for leave to file supplemental reply comments to address the issue of the availability of 800 Service Access to the OCCs. AT&T opposed Lexitel's motion. In light of our holding that the 800 Service issue is not properly raised in this reconsideration round and the fact that this issue has been properly raised, and will be addressed, in other proceedings, we deny Lexitel's motion. *See infra* at paras. 28-29.

[51] *See Access Charge Order* at paras. 151-68, *First Reconsideration Order* at paras. 91-127, and *Second Reconsideration Order* at paras. 51-92.

[52] *See Third Reconsideration Order* at paras. 14-20.

Indeed, Lexitel asserted that under a flat-rate structure:

> smaller OCCs and resellers, who often are recent entrants into the long distance services market, would pay access rates in excess of their own usage to subsidize rates paid by the larger, older OCCs below that warranted by their usage. This is unlawfully discriminatory and violative of Commission policies.[53]

To support this position, Lexitel pointed out that under the NECA flat-rate tariff, its non-premium rate, given its average usage level of 7500 MOU per line per month, computed to $0.045 per minute, while GTE Sprint, averaging over 12,000 MOU per line per month, paid only $0.028 per minute, a differential of 60% in access costs.[54] Thus, to the extent that GTE Sprint and MCI are asserting that the smaller OCCs are indifferent about whether Part 69 provides for usage-based or flat-rate charges for non-premium FGA access, they are clearly incorrect.

20. These petitioners' real argument is that we should provide all OCCs with the option of ordering non-premium access on either a flat-rate or usage-sensitive basis. This, in effect, would make the phenomenon referred to in the *Third Reconsideration Order* as the "FX Loophole" a permanent feature of our access charge rules. While we concluded in the *Third Reconsideration Order* that Part 69 did not prohibit the use of the FX loophole by OCCs, it was never our intent to have the FX loophole become a permanent part of our rules. We decided to continue the present rate structure, including the FX loophole, until January 1, 1986, only because the available alternatives were unacceptable—*i.e.*, moving immediately to a full usage-based rate structure would not have provided the larger OCCs with an adequate transition period, and closing the FX loophole, by requiring that the flat rate be applied to all OCC non-premium access during that transition period, would have been unduly harmful to the smaller OCCs.

21. The establishment of usage-based charges for non-premium access will ensure that the prescribed 55% discount—no more, no less—will be applied to all the non-premium traffic of the OCCs, both individually and as a group. The continuation of a flat-rate, non-premium access charge for OCCs with over 9,000 minutes of use, in conjunction with usage-based charges for OCC lines with lower usage, would not fully address the problem of differing

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[53] Lexitel Petition for Clarification, CC Docket Nos. 78-72, Phase I, and 83-1145, Phase I (February 21, 1985) at Summary.

[54] *See Third Reconsideration Order* at n. 40.

treatment between large and small OCCs. Furthermore, such a rate structure would result in an overall OCC discount for non-premium access that would exceed the prescribed 55% level.[55]

22. Some larger OCCs have asserted that the decision to implement usage-based charges for non-premium access impacts most negatively on those OCCs with the greatest chance of surviving the transition to equal access and that assistance to such OCCs would have a positive effect on the smaller OCCs as well, with such actions providing investor confidence in the OCCs generally. It would not be appropriate policy making, however, for us to slant our rules to favor firms that we forecast will be "winners" in the competitive battle and, in effect, write-off other competitors that we forecast will be "losers." It is for the marketplace, not this Commission, to determine which competitors will be "winners" and "losers." It *is* the responsibility of this Commission to ensure that all carriers receive an equal opportunity to compete in that marketplace. The establishment of usage-based charges for non-premium access will provide all OCCs with that equal opportunity.

23. Some OCCs also complain that the shift to usage-based charges will be seriously disruptive to their network design activities and overall planning. We are sensitive to the fact that OCCs need time to adjust their plans in light of this change in the non-premium rate structure. It was for this reason that we provided an extensive transition period for the shift to usage-based charges. We are confident that the implementation of such charges on January 1, 1986,—more than nine months after the adoption of the *Third Reconsideration Order*—provides that this change will not be unduly disruptive to the operations of the larger OCCs, who have made the greatest use of flat-rate, non-premium access.

24. We also find no basis for reversing our decision to require usage-based charges in GTE Sprint's unsupported assertions that

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[55] For example, Ameritech states that approximately one-half of Illinois Bell's OCC FGA lines carry more than 9000 MOU per line per month and approximately half carry less than that. It adds that the average usage per month on lines that exceed 9000 MOU is 13,199 MOU, while the average usage for lines with usage below 9000 MOU is 5133 MOU. Ameritech Opposition at 7. Thus, if the FX loophole were made a permanent part of the access charge plan, the non-premium discount for OCCs in the aggregate in Illinois Bell's operating area would be approximately 62%. (This is assuming that all lines with average usage above 9000 MOU would be paid for on a flat-rate basis, and all lines with less than 9000 MOU would be paid for on a usage-sensitive basis.) On the other hand, under a pure flat-rate structure, in Illinois Bell's operating area, traffic on FGA lines with more than 9000 MOU per line would receive on

there may be a substantial number of end offices without measurement capability. Indeed, all the evidence on this point in the record indicates that the vast majority of end offices do have such measurement capability.[56] While GTE Sprint attempts to dismiss this evidence as not comprehensive enough, it presents no evidence of its own to the contrary.[57] While in other circumstances we might decide to supplement an existing rulemaking record by undertaking the type of data-gathering exercise GTE Sprint asserts is necessary here, we conclude that the need for such an exercise, which would delay the implementation of an important change in the rate structure for non-premium access, is not invoked by the bare assertions in GTE Sprint's petition.

25. In any event, the gravamen of GTE Sprint's complaint—that the establishment of a usage-based rate structure for non-premium access will require substantial expenditures by the exchange carriers to install equipment with measurement capability—is simply incorrect. There has never been any provision in the Part 69 rules requiring the installation of such equipment and the *Third Reconsideration Order* made no change in this regard. The presently effective rules do provide for the provision of FGA on a usage-sensitive, as well as a flat-rate, basis. Indeed, it is the availability of this usage-based option that gave rise to the "FX loophole" phenomenon discussed above. But we have permitted exchange carriers without measurement capability in their end offices to bill all their FGA customers on a flat-rate basis. This situation will not change on January 1, 1986—that is, in end offices without measurement capability, FGA may continue to be

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average a 69% discount, while traffic on FGA lines with less than 9000 MOU per line would receive only a 21% discount.

[56] Pacific Bell states that is has measurement capability in 95% of its FGA offices. Pacific Bell Opposition at 4–5. Ameritech states that Illinois Bell can measure usage on 97% of its FGA lines. Ameritech Opposition at 7. Furthermore, in a recent order addressing rate structure tariff revisions filed by NECA and certain BOCs, we estimated that approximately 95% of all end offices are currently equipped with measurement capability, and found that this number will continue to rise as local exchange carriers install measurement equipment in an increasing number of end offices. National Exchange Carrier Association, Inc., Memorandum Opinion and Order, Trans. No. 60, Memorandum Opinion and Order, Mimeo No. 6564, released August 23, 1985, at n. 30.

[57] GTE Sprint's reference to exchange carrier tariff provisions for assumed usage in end offices where actual usage cannot be measured does not constitute such evidence. Any exchange carrier with measurement capability in less than 100% of its end offices (such as Pacific Bell and Illinois Bell, which clearly can measure usage on the vast majority of FGA lines) must include some provisions in its tariffs to bill for traffic in those end offices where usage cannot be measured. Such provisions simply indicate that measurement capability is not universal, and not that there is a widespread absence of such capability.

billed on a flat-rate basis. We recently addressed the mechanics for implementing such flat-rate charges, both for the transition period ending January 1, 1986, and thereafter.[58] Thus, in those end offices without measurement capability, GTE Sprint will be able to continue to receive FGA access on a flat-rate basis, a result which presumably it will find advantageous, and not detrimental to its interests.

B. LATA-Wide Access For Terminating FGA

26. The petitions for reconsideration raising the issue of LATA-wide access for terminating FGA traffic are procedurally defective. As we noted in the *Third Reconsideration Order*, the Part 69 rules do not specify any particular geographic scope for the transport element. This was true when the rules were originally promulgated, and none of the subsequent reconsideration orders, including the *Third Reconsideration Order*, made any change in this regard. Threfore, the requests for reconsideration of this issue are dismissed as untimely.

27. Furthermore, we reaffirm our conclusion that the tariff review process provides the proper forum for resolving any concerns about LATA-wide access for terminating non-premium FGA traffic. Indeed, in the recent access tariff filings, some exchange carriers filed tariff revisions to impose intrastate toll rates on FGA traffic terminating outside the local calling area (the practice that the petitioners here appear most concerned with), and these proposals attracted substantial comment. In a recent Order, the Common Carrier Bureau rejected these proposed changes.[59] If review of this aspect of the Bureau Order is sought before the Commission, we will address the Bureau's holding on this issue. Thus, we see no basis for concluding that the tariff

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[58] *See NECA Order, supra* note 56, at para. 19. In that Order, we required NECA and the BOCs to establish a new surrogate for use at end offices lacking measurement capability (based on data drawn exclusively from such end offices) by the January 1, 1986, implementation date for usage-based non-premium access charges.

[59] *See In the Matter of Annual 1985 Access Tariff Filings*, Memorandum Opinion and Order (Common Carrier Bureau), Mimeo No. 7401 (released September 30, 1985) (hereinafter *Access Tariff Order*). In this Order, the Bureau noted at the outset that the proposed tariff revisions raised a rate question, and not a question dealing with the geographic scope of FGA terminating access. It concluded that when a local exchange company provides terminating service for interstate calls, whether within the local calling area or the LATA, it must apply interstate access charges; and, therefore, the Bureau declared unlawful those proposed tariff revisions that purported to apply another, intrastate rate. *See Access Tariff Order* at paras. 104-09.

review process is not providing for adequate ventilation and resolution of these issues.

C. Phase-Out of the Non-Premium Discount on an End-Office Basis

28. The *Third Reconsideration Order* also affirmed the determination we made in the *Second Reconsideration Order* that the non-premium discount should be phased-out on an end-office-by-end-office basis.[60] In doing so, we rejected petitions for reconsideration filed by a number of OCCs on this aspect of the access charge plan. Therefore, the petition for reconsideration of this issue filed by Lexitel is repetitious and untimely.

29. Moreover, the issue of the phase-out of the non-premium discount is raised in the joint rulemaking petition filed by four OCCs addressing the status of competition in the interLATA services market.[61] This petition and the responsive pleadings (including comments filed by Lexitel) raise all the factual and policy issues identified by Lexitel in its reconsideration petition. We believe that, to the extent it is appropriate to address this issue again in light of new facts or changed circumstances, the OCC joint petition provides the proper vehicle for that reexamination. In this reconsideration round, Lexitel also has attempted to raise, in the first instance, the issue of interexchange carrier access to 800 Service. This request also is not timely. In addition, this issue is also raised in the OCC joint petition and related issues have been raised in a petition Bell Atlantic has filed for a rulemaking to address the exchange carriers' 800 Service obligations under the Communications Act.[62] We conclude that it also is more appropriate to address the 800 Service issue in one of those proceedings, in which it has been properly raised.

IV. Ordering Clauses

30. Accordingly, IT IS HEREBY ORDERED, That pursuant to 47 U.S.C. U.S.C. §§ 154(i) and (j), 201, 202, 203, 205, 218, and 403, and 5 U.S.C. § 553, the petitions for reconsideration of the

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[60] *See Third Reconsideration Order at* paras. 26–30.

[61] GTE Sprint Communications Corporation, United States Transmission Systems, Inc., Allnet Communications, Inc. and US Telecom Inc., Joint Petition for Expedited Rulemaking, RM–5057, Public Notice, Mimeo No. 5287, June 20, 1985.

[62] Bell Atlantic Petition for Rulemaking, RM 5101, Public Notice, Mimeo No. 5985, July 24, 1985.

Third Reconsideration Order are DENIED.

31. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplemental Reply Comments requested by Lexitel is DENIED.

32. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A-may be seen in FCC's Dockets Branch, 1919 M Street, N.W., Wash., D.C.

Air Hazard Issues
Summary Decision

Review Board affirms ALJ's Summary Decision denying application on air hazard issue for lack of FAA clearance or request for restudy.
—*Neil I. Sanders*
MM Docket No. 84-1004

FCC 85R-87

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Neil I. Sanders	MM Docket No. 84-1004 File No. BPCT-840706KH
Villa-Reeve, LTD.	MM Docket No. 84-1005 File No. BPCT-840710KK
For Construction Permit Baytown, Texas	

Appearances

Thomas L. Root, on behalf of Neil I. Sanders; and *Donald E. Ward* and *Chester F. Naumowicz* on behalf of Villa-Reeve, Ltd.

DECISION

Adopted: October 24, 1985; Released: October 29, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Neil I. Sanders (Sanders) and Villa-Reeve Ltd (Villa-Reeve) for

authority to construct a new commercial television station on Channel 57 at Baytown, Texas. By *Hearing Designation Order* (*HDO*), 49 Fed. Reg. 45254, published November 15, 1984[1], these two applications (and three others subsequently dismissed) were designated for hearing on air hazard issues directed against Sanders, and on the standard comparative issue.[2] On May 3, 1985, after an evidentiary hearing had been completed and the record closed,[3] residing Administrative Law Judge (ALJ) Walter C. Miller released a *Summary Decision* (*S.D.*), FCC 85D-32, in which he denied Sanders' application, concluding that no genuine issue of fact existed on the air hazard issue and that Sanders had failed to meet his burden of proof. *S.D.*, para. 12. He also granted Villa-Reeve's application and terminated the proceeding, noting that Villa-Reeve was the only remaining applicant and that no basic qualifying issues were outstanding against it. *S.D.*, para. 14.

2. The proceeding is now before the Review Board on exceptions filed by Sanders and a reply by Villa-Reeve. The Board has reviewed the *S.D.* in light of these pleadings, the oral argument held on September 13, 1985 and our review of the record. We adopt the *S.D.*'s findings and conclusions and conclude for the following reasons that the ALJ properly denied Sanders' application.

3. The following chronology is pertinent: Sanders filed his application on July 6, 1984. *S.D.*, para. 2. Only three days prior thereto, he had filed for air hazard clearance with the FAA, *id.*, which — on August 31, 1984 — notified Sanders of its refusal to grant air hazard clearance because his "proposal would seriously affect instrument flight procedures into Baytown Humphrey airport . . . . " *Id.*, para. 3. The FAA further advised Sanders that he might obtain air hazard clearance if he reduced his proposed tower height to 320 feet, *id.*, or he could request further study of the matter by the FAA within 30 days of its refusal letter. Sanders did not amend his application by reducing his proposed tower height, or amend it in any other way. Or, as the ALJ puts it:

> Sanders did nothing. He never contested the FAA's preliminary hazard determination; he didn't ask that the matter be studied further; and he never reduced his tower height to 320 feet above ground level.

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[1] The *HDO* was released by the Commission on November 2, 1985. Mimeo No. 616.

[2] An air hazard issue was also designated against Villa-Reeve but was resolved in that applicant's favor by summary decision. *See Memorandum Opinion and Order*, FCC 85M-1810, released April 23, 1985.

[3] The record was closed on April 9, 1985.

S.D., para. 4. Accordingly, when the Commission designated the mutually exclusive Baytown applications for comparative hearing on November 2, 1984, *see HDO*, *supra*, an air hazard issue was duly specified against Sanders. *See* 47 CFR Part 17.

4. The Commission's rules liberally permit an applicant faced with a potentially disqualifying basic issue to amend within 30 days of the order designating the hearing. 47 CFR § 73.3522(b)(2). Nonetheless, Sanders did not amend, but again did "nothing." So, on November 7, 1984, the ALJ notified the parties that, unless the air hazard issue was resolved, direct evidence would be exchanged at the prehearing conference therein scheduled for February 1, 1985. *Order Prior to Prehearing Conference*, FCC 84M-4733 (ALJ). On February 11, 1985, Sanders submitted his "evidence," a two-sentence statement (Sanders Exh. 3), which statement blithely claimed that the FAA had "not yet determined whether the standard instrument approach procedures can be modified in such a way as to accommodate Mr. Sanders' proposal." *See S.D.*, para. 7. As the ALJ observes, however, Sanders' statement is disingenuous because Sanders never properly requested that the standard instrument approach at the airport be modified (*see id.*, at n. 3). So far as the record shows, he did not request further study pursuant to the 1984 FAA refusal letter. Upon submission of the Sanders "evidence," the ALJ specifically admonished "that if the FAA administrator hadn't reversed his determination" by the time the ALJ finished writing the initial decision in this case, the ALJ would disqualify Sanders on the air hazard issue. *S.D.*, para. 8. In response, Sanders did not seek to amend his application[4]; nor, so far as the record shows, did Sanders at that point request the FAA to restudy its clearance refusal. Again, Sanders did "nothing."

5. Based on Sanders' utter inaction, Villa-Reeve, on April 4, 1985, filed a motion for summary decision against Sanders on the air hazard issue. *S.D.*, para. 9. *Still*, the ALJ did not disqualify Sanders; rather, at further hearing sessions conducted on April 8-9, 1985 — the record being formally closed on that latter date (*id.*) — the ALJ tentatively denied the Villa-Reeve motion at that

[4] By this point, any attempt to amend the Sanders application would have been required to be accompanied by the "good cause" showing required pursuant to 47 CFR § 73.3522(b)(1)(i). *See generally California Broadcasting Corp.*, 90 FCC 2d 800 (1982); *Royce Int'l Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Dir. filed April 30, 1985 (mem.); *Dutchess Communications Corp.* 58 RR 2d 381 (Rev. Bd. 1985); *Cannon Communications Corp.*, 58 RR 2d 950, 955 (Rev. Bd. 1985) (applications for review pending); *Houston Family Television, Ltd.*, 58 RR 2d 1557, 1559-1560 (Rev. Bd. 1985) (applications for review pending).

time, and he advised Sanders that if he did not have an FAA air hazard clearance by the time the initial decision was ready for issuance, Sanders would be disqualified.[5] *Again*, Sanders did "nothing"; and, on May 1, 1985, the ALJ granted the Villa-Reeve motion for summary judgment, upon which grant the instant Sanders appeal to the Board is predicated.

6. Sanders is truly a "nothing" applicant. His brief is appalling, as, indeed, is his continued presence before this Commission. Despite the ALJ's indulgence in the face of an applicant clearly without a viable transmitter site — rather a *sine qua non* of a broadcast construction permit application — Sanders' brief somehow suggests that he was misled because the ALJ's May 1, 1985 action was a deferred grant of Villa-Reeve's motion to dismiss Sanders' application rather than an initial decision having the identical substantive effect.[6] Sanders contends that dismissal of his application without a "hearing" on the air hazard issue was improper in the face of his own Exhibit 3 statement that "further aeronautical study" is necessary to determine whether his tower would be a hazard to air navigation.[7]

7. Nothing mandates an FCC applicant to "switch rather than fight" on its choice of a transmitter site. However, insofar as any "further aeronautical study" might have caused the FAA to revise its no clearance position, the record reflects that Sanders neither requested such further study (as per the August 31, 1984 FAA invitation), nor submitted any such study in response to the Commission's designation of an air hazard issue. Moreover, he did not seek to amend his application after the FAA's refusal to grant his air hazard clearance; or after the Commission designated the air hazard issue; or after the evidence exchange date; or after the ALJ's admonition in April 1985; or prior to oral argument before the Board; or — in fact — to this very date.

8. As we stated in *Dutchess Communications Corp.*, *supra* note 4: "The first principle of [the application process] is that those filing an application for a broadcast construction permit be *ready*, *willing* and *able*." 58 RR 2d at 390 (emphasis in original). Even if

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[5] Sanders Exceptions at 2 (*quoting* Tr. 354).

[6] *See id.*, at 5-6.

[7] *Id.* An evidentiary hearing is required only when there are present significant and material questions of fact. 47 U.S.C. § 309(e). Having ignored the FAA's invitation to have it restudy its preliminary air hazard determination, Sanders' unilateral and unsupported (Exh. 3) assertion that the FAA administrator had not yet determined that "standard instrument approach procedures" could not be modified after further study creates no "factual questions." It may be, in a cheap way, "creative" — but nothing more.

we stretch our point and construe Sanders' continued presence in this proceeding as some vainglorious manifestation of willingness, one-out-of-three of the above conditions plainly will not do. Sanders has played out his dangling string — and we, too, are at the end of *our* rope. That Sanders has been successful in using procedural string to tie up its remaining opponent's application for more than a year after the FAA refused to clear his tower site is a testament to the niceties of adminstrative due process, if nothing else. Just barely missing a referral of this entire matter to other authorities on grounds set forth in 47 CFR § 1.52,[8] and so as not to prolong this case and delay the initiation of new television service to the citizens of Texas any further, we affirm the ALJ's summary decision. *See generally Midwest St. Louis, Inc.*, 79 FCC 2d 519 (1980).

9. ACCORDINGLY, IT IS ORDERED, That the application of Neil I. Sanders (File No. BPCT-840706KH) for a construction permit for a new television station at Baytown, Texas IS DENIED; that the application of Villa-Reeve, Ltd (File No. BPCT-840710KK) IS GRANTED; and that the petition for leave to amend filed on May 8, 1985 by Villa-Reeve, Ltd IS GRANTED, and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[8] *Inter alia*, § 1.52 prohibits the filing of pleadings "interposed for delay." In that connection, we note that — at one point in this proceeding — Sanders settled out of this case, but apparently reneged. *See Sanders Exceptions* at 2. While we do not here pursue the abuse of process issue contemplated by the ALJ, *see id.* and Tr. 301, the near frivolousness of Sanders' appeal to the Board and his continued presence — *to this day* — without a qualifying transmitter site seems grounds enough should another authority choose to pursue the matter *sua sponte*.

FCC 85D-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Neil I. Sanders	MM Docket No. 84-1004 File No. BPCT-840706KH
Villa-Reeve, LTD.	MM Docket No. 84-1005 File No. BPCT-840710KK
For Construction Permit Baytown, Texas	

Appearances

Thomas L. Root on behalf of Neil I. Sanders; and *Chester F. Naumowicz* on behalf of Villa-Reeve, Ltd.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: May 1, 1985; Released: May 3, 1985

1. This is a ruling on a Motion for Summary Decision that Villa-Reeve, Ltd. (Villa-Reeve) filed on April 4, 1985. That Motion, directed at Neil I. Sanders, asks that the air hazard issue that the Chief, Video Services Division has designated against Sanders be resolved adversely to Sanders. See 49 F.R. 45254 published November 15, 1984, at para. 3, and Issue 1. Sanders opposed Vlla-Reeve's motion on April 19, 1985.[1]

[1] Sanders' Opposition is one day late. Consequently, on April 29, 1985, Villa-Reeve filed a Motion to Strike Sander's Opposition. That Motion to Strike IS DENIED; Sanders' Opposition will be considered.

Background

2. On July 3, 1984, three days before he filed his application in this proceeding, Sanders filed for an air hazard clearance with the FAA for his proposed antenna structure. The FAA responded to Sanders' request on August 31, 1984. In its response it did four things.

3. First, the FAA acknowledged receiving Sanders' request. Second, it told him that it couldn't grant Sanders a clearance because "[t]his proposal would seriously affect instrument flight procedures into Baytown Humphrey airport . . ." Third, it let Sanders know that he could request further study of thematter ". . . within 30 days of the date of his acknowledgement." And finally, the FAA coached Sanders on how to obtain an air hazard clearance at his proposed site. It said "if the proposed structure were reduced in height to not exceed 320 ft. above ground level (358 ft. above mean sea level), it would not exceed Part 77 obstruction standards."

4. Sanders did nothing. He never contested the FAA's preliminary hazard determination; he didn't ask that the matter be studied further; and he never reduced his tower height to 320 feet above ground level.

5. Subsequently, the Chief, Video Services designated this case for hearing. He did so on November 2, 1984. The Chief said that since no determination had been made that Sanders' tower height and location wouldn't constitute an air hazard, an appropriate issue had to be designated.[2]

6. The Prehearing Order was released November 7, 1984 (FCC 84M-4733). There each applicant with an air hazard issue was instructed to either get that issue satisfactorily resolved before the February 1, 1985 prehearing conference, or to exchange its air hazard evidence on that date.

7. Again Sanders made no effort to come to grips with his problem. See Sanders' Deposition taken on January 24, 1985 at page 61. Instead, on February 1, 1985, he exchanged an air hazard exhibit (Sanders Exhibit 3). That two page exhibit consisted of a copy of the FAA's August 31, 1984 preliminary

[2] The Chief designated an air hazard issue against four applicants: Reyes, Villa-Reeve, Pleasant Spring, and Sanders. Pleasant Spring's application has been dismissed (FCC 85M-763, released February 19, 1985), and Reyes and Villa-Reeve successfully resolved their air hazard issues. See FCC 85M-608, released February 11, 1985; and FCC 85M-1810, released April 23, 1985.

determination (see paras. 2-3 *supra.*), and the following statement:

> "The Federal Aviation Administration has made a prelininary determination that the facilities proposed by Mr. Sanders would have a serious effect on standard instrument approach procedures at Baytown Humphries airport. *The administrator has not yet determined whether the standard instrument approach procedures can be modified in such a way as to accommodate Mr. Sanders' proposal.*"[3] (Underlining added.)

8. An evidentiary admission session was held on February 11, 1985. There the Presiding Officer received Sanders Exhibit 3 into evidence. But he specifically warned Sanders that if the FAA administrator hadn't reversed his determination by Initial Decision time, then Sanders would have failed to meet his air hazard issue, and his application would have to be denied (Tr. 51-52).

9. The first hearing session was held on March 4, 1985. Still Sanders had made no move to get his air hazard issue resolved. This history, along with certain other events that occurred,[4] caused Villa-Reeve to file the Motion for Summary Decision now being considered. Further hearing sessions were held on April 8-9, 1985, the record being closed on April 9th.

10. Villa-Reeve points out that the burden of proof on the air hazard issue has been and still is on Sanders himself; that no genuine issue of fact exists; and that the truth is clear: Sanders has failed to meet that burden. So, says Villa-Reeve, denial of the Sanders' application is proper. It cites *Texan Broadcasting Co., Inc.* 49 RR 2d 1287 (1981).

11. Sanders opposes. He asserts that the question of whether his proposed tower is a hazard to air navigation is still unsettled. Then, in an unguarded moment, Sanders admits that he has abandoned the site involved in this case. He avers "Sanders has proceeded to obtain a determination of no hazard for another site, and will file an amendment on April 22, 1985."[5]

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[3] Sanders has never requested that the standard instrument approach procedures at Baytown Humphries airport be modified. See paras. 3-4 *supra.* So Sanders' Exhibit 3 is disingenuous insofar as it suggests that Sanders has taken steps to get the preliminary air hazard determination reversed.

[4] This record reflects that on March 4, 1985, Sanders made a settlement offer to Villa-Reeve, and Villa-Reeve accepted that offer. Subsequently Sanders reneged on the agreement he himself had proffered. This caused a disruption and delay in the hearing of the case. See Tr. Vol. 4.

[5] This April 22nd representation, like Sanders' March 4, 1985 settlement agreement, has proven ephemeral. No amendment was filed on April 22, 1985. In fact, as of the date this Decision was issued, no such amendement has been filed.

Ruling

12. Villa-Reeve's Motion will be granted. No genuine issue of fact exists, the basic facts are undisputed, the truth is clear. Sanders has failed to meet his burden of proof under designated issue 1, and it must be resolved against him. See *Midwest St. Louis, Inc.*, 79 FCC 2d 519 (1980); also see *Chudy Broadcasting Corporation*, FCC 85-193 released April 19, 1985.

13. Sanders argues that the air hazard question is still unsettled. That isn't so. The evidentiary record is closed, and the record shows that he hasn't demonstrated that his proposed antenna structure will not be a hazard to air navigation. The question is settled and Sanders knows it. Otherwise why would he announce plans for abandoning the site?[6]

SO the Motion for Summary Decision that Villa-Reeve, Ltd. filed on April 4, 1985, and directed at Neil I. Sanders' application, IS GRANTED; and Issue 1 at 49 F. R. 45254 published November 15, 1984 is RESOLVED adversely to Neil I. Sanders.

Findings of Fact

14. Villa-Reeve's summary decision request granted, it follows that Sanders' application must be denied. Thus, only one applicant, Villa-Reeve remains. Villa-Reeve has no basic qualifying issues outstanding against it. See FCC 85M-1810 released April 23, 1985. Since it is otherwise qualified to construct and operate as proposed (49 F.R. 45254 *supra.*, para. 6), Villa-Reeve's application can be granted.

Conclusions of Law

15. Neil I. Sanders' has failed to meet his burden of proceeding under the air hazard issue. So his application must be denied. Villa-Reeve is basically qualified to be a Commission licensee. So the public interest, convenience, and necessity would be served by granting its application.

SO unless an appeal is taken from this Summary Decision or the Commission reviews it on its own Motion[7], Neil I. Sanders'

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[6] It is true that at one time the Presiding Judge was disposed to wait until the Initial Decision to decide Sanders' air hazard issue. But that was before he learned that Sanders has abandoned his site, and apparently wants to unravel much of what has been accomplished by moving to another site. Sanders never reported that he abandoned his original site.

[7] If exceptions aren't filed within 30 days, and the Commission doesn't review the case on its own motion, this Summary Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

application (BPCT-840706KH) IS DENIED; Villa-Reeve, Ltd.'s application (BPCT-840710KK) IS GRANTED; and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

Application, Amendment of, failure to File
Character Qualifications
Diversification, of Control of Mass Media
Issue, Enlargement of, Denied
Ownership and Management, Integration of

Review Board affirms ALJ's grant of television construction permit to applicant in five party comparative hearing. One of losing applicants was given a slight to moderate diversification preference but that preference was outweighed by the winner's substantial integration preference. A character issue was also resolved in winning applicant's favor and a motion for additional issues (reporting, financial and ineptness) denied.

—*Omaha TV. Inc.*
BC Docket No. 80-691

FCC 85R-91

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Omaha TV 15, Inc. Omaha, Nebraska	BC Docket No. 80-691 File No. BPCT-790629KG
Channel 15/Omaha (Formerly Sun Broadcasting, Inc.) Omaha, Nebraska	BC Docket No. 80-93 File No. BPCT-790409KE
Mid-America Broadcasting, Inc. Omaha, Nebraska	BC Docket No. 80-694 File No. BPCT-791026KN
Koplar Communications, Inc. Omaha, Nebraska	BC Docket No. 80-695 File No. BPCT-790703KF

Family Television, Inc. Omaha, Nebraska	BC Docket No. 80-696 File No. BPCT-790627KE
For a Construction Permit for a New Television Station	

Appearances

Reed Miller on behalf of Omaha TV 15, Inc., *Thomas Schattenfield, Gerald E. Oberst, Jr.*, and *David Tillotson* on behalf of Channel 15/Omaha; *Leo I. George* on behalf of Mid-America Broadcasting, Inc., *Herbert D. Miller, Jr.* on behalf of Koplar Communications, Inc., and *Michael L. Glaser, Francis E. Fletcher, Jr.*, and *Lynn M. Clancy* on behalf of Family Television, Inc.

DECISION

Adopted: November 4, 1985; Released: November 21, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING WITH STATEMENT.

BOARD CHAIRMAN MARINO:

1. This is a five party comparative case to select one applicant for authority to construct a new commercial television station to operate on Channel 15 in Omaha, Nebraska. Following a trial-type hearing, presiding Administrative Law Judge (ALJ) Chachkin issued an Initial Decision (I.D.), FCC 83D-52, released September 9, 1983, in which he granted the application of Mid-America Broadcasting, Inc. (Mid-America) and denied the remaining applications. The case was held in abeyance until April 1, 1985 when the parties filed exceptions. See note 1, below. On that same date, Family Television, Inc. (Family) filed a motion to enlarge issues seeking the specification of reporting, ineptness, and financial issues against Mid-America. We have reviewed the I.D. in light of the exceptions, the oral argument held on September 27, 1985, the motion to enlarge issues, and our examination of the record. We

adopt the ALJ's findings of fact and conclusions of law, except as modified below, and affirm his conclusion that a grant of Mid-America's application would best serve the public interest, convenience, and necessity.

2. *Background*: The competing applications were designated for a standard comparative hearing. I.D., para. 1. Thereafter, the presiding ALJ added two qualifying issues against Mid-America — the Jackson Cable TV violations issue and a Section 605 issue. Order, FCC 82M-1649, released May 25, 1982. After the hearing, the ALJ resolved the qualifying issues in favor of Mid-America, and then concluded that Mid-America was the comparatively superior applicant predicated on a substantial integration preference awarded Mid-America over each of the other applicants. I.D., paras. 98, 100. Family was found to be the preferred applicant on the diversification criterion, receiving a preference over Mid-America, but this diversification superiority was outweighed by Mid-America's more substantial integration advantage. *Id.*, paras. 90, 100. The overall ranking of the applicants by the ALJ was as follows: (1) Mid-America, (2) Channel 15, (3) Family, (4) Omaha TV, and (5) Koplar. *Id.*, para. 100.[1]

3. The exceptions primarily relate to Mid-America's exoneration on the cable television violations issue and to the respective positions of the applicants on the integration and diversification criteria. Omaha TV also contends that the ALJ erred in resolving the Section 605 issue in Mid-America's favor, but its exception, concededly "not address[ed] ... at length ...," need not be discussed further because it does not comply with Section 1.277(a) (exceptions "shall point out with particularity alleged material errors in the decision or ruling and shall contain specific refer-

[1] The filing of exceptions, however, was long delayed due to the following circumstances. On September 23, 1983, the parties filed before the Review Board a joint motion requesting an extension of time to file exceptions to the I.D., asserting that the parties were engaged in an earnest effort to reach a settlement agreement which would obviate the need for filing exceptions. The motion represented that three parties had actually signed one settlement agreement and the remaining two a similar agreement with certain modifications. They stated that additional time was needed for further discussions. The Board granted the extension motion. Subsequently, settlement negotiations were interrupted by events arising out of litigation involving one of the parties, but the parties were relatively hopeful that a resolution of the litigation would be reached quickly and the case ultimately settled. Thus, additional extensions of time were granted. Finally, on February 20, 1985, when it became apparent that the parties could not reach a settlement, the Board by letter directed the parties to file their settlement agreement, if any, or their exceptions to the I.D. by April 1, 1985.

ences to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based").

4. *Jackson Cable TV Violations Issue.* This issue was specified against Mid-America based upon a Summary Decision by Administrative Law Judge Daniel Head (*Jackson Cable TV*, 69 FCC 2d 1724 (ALJ 1978)), in which he found that Jackson Cable TV (Jackson Cable) had violated both Section 76.11 of the cable television rules, by carrying the signals of three St. Louis television stations without obtaining the requisite certificate of compliance from the Commission, and Section 76.63, by carrying such signals without a waiver of the rules. I.D., para. 17.[2] Judge Head concluded that because a requested waiver had been specifically denied by the Commission, the cable system had knowingly and willfully violated the cable television rules. *Id.* He therefore ordered the entry of a cease and desist order requiring the cable system to terminate the carriage of the St. Louis signals, an order that was affirmed by the Review Board in *Jackson Cable TV*, 69 FCC 2d 1717 (Rev. Bd. 1978). *Id.* Because at the time of the violations, Larry Hudson, Mid-America's controlling stockholder, had a derivative ownership of approximately 30%–40% in Jackson Cable and had been designated its managing partners (*id.*, para. 7), the issue was designated to explore Hudson's role in the violations and the effect of such involvement on Mid-America's basic or comparative qualifications. *Id.*, para. 79.

5. The ALJ's findings and conclusions set forth in I.D. paras. 6–18 and 79–82, adequately recite the record evidence and need not be repeated. An outline of the facts may be helpful, however, in understanding the exceptions. In November 1975, Jackson Cable was a partnership, owned 50% by Jackson Cable TV, Inc., a company controlled by Hudson through which he was attributed a 30–40% equity interest in Jackson Cable, and 50% by ten individuals (each owning a 5% interest) from Jackson, Missouri, and was franchised by the city of Jackson to operate a cable televison system. *Id.*, paras. 6–7. Under the partnership articles, Hudson, the designated managing partner, had only one vote of the eleven votes on partnership matters and was subject to removal by 60% of the partners. *Id.*, para. 7. Additionally, unlike the local partners, Hudson did not live in Jackson. *Id.*, para. 8. The unlawful signal carriage of the St. Louis stations occurred from sometime in April 1976, when the system first became large

[2] These sections have since been deleted from the Commission's Rules.

enough to be covered by the Commission's rules, until the end of 1979. Hudson held the position of managing partner from the cable system's inception until his voluntary resignation in May 1977 and the focus of inquiry, therefore, was limited to the period from April 1976 to May 1977. *Id.*, para. 80

6. Briefly stated, the I.D. exonerates Hudson and places the responsibility for the unlawful carriage on the ten local partners. *Id.*, para. 82. It cites (a) Hudson's actions in seeking advice of counsel in early 1976 and then purchasing a $7,000–$8,000 state of the art Jerrold automatic switching device that would permit lawful carriage of the St. Louis signals under certain circumstances without prior Commission approval, (b) his continued use of the device despite frequent breakdowns, (c) the fact that he played no role and was unaware that the switching device had been abandoned in the fall of 1976, and (d) his repeated attempts to get his partners to agree to activate the switcher after he learned that it had been turned off. *Id.*, para. 82. The ALJ rejected an argument raised by the parties that Hudson as managing partner had responsibility for the violations. He pointed out that Hudson had only one of eleven votes on partnership matters, was subject to removal as managing partner by a vote of 60% of the partners, and lived in Chanute, Kansas from which he only visited Jackson three days each month. *Id.* The ALJ further pointed out that Hudson's only recourse was to accede to his partners' wishes or terminate his position, a recourse Hudson pursued when the partners unanimously approved a motion directing him as managing partner not to cut off any channels currently received by the Jackson system. *Id.*, paras. 15, 82. The ALJ also found significant the fact that when Hudson acquired control of the Jackson system in late 1979, he immediately directed that carriage of the St. Louis signals be terminated. *Id.*, para. 82.

7. The exceptions in most part repeat the contention that Hudson was in complete charge of the operations and that his testimony disclaiming responsibility for the violations is not credible. Exceptors cite the testimony of two Jackson Cable technicians, Jerald Jones and Rick Haupt, for support that the partners generally followed the advise of Hudson and that the switching device was purchased to provide network nonduplication protection to the St. Louis stations and not to comply with the cable signal carriage rules. One of exceptors also points out that Jones never knew of any conflict between Hudson and the

other partners.

8. We will deny the exceptions. The ALJ set forth persuasive reasons why the responsibility for the unlawful carriage did not rest with Hudson. The fact that Hudson was the managing partner is not by itself particularly significant because under the terms of the partnership agreement Hudson was, as aptly characterized by the ALJ, "effectively powerless" to force his will and direction on the other ten partners. Nor do we find relevant or significant the testimony of Jones and Haupt that the partners generally followed Hudson's advice or what they were unaware of any conflict between the partners. As pointed out by the ALJ, there was no evidence that Hudson ordered the switching device to be turned off, none of the local partners were called as witnesses, and Hudson was found to be a truthful witness. *Id.*, para. 8. The ALJ's determination as to Hudson's truthfulness is entitled to considerable weight. *See Adell Broadcasting Corp.*, 99 FCC 2d 477, 482, 57 RR 2d 307, 310 (Rev. Bd. 1984). With respect to the contention that the cable technicians testified that the switching device was purchased to provide network nonduplication protection, Mid-America explains (Br. at 7) that the operation of the device is similar for both nonduplication and signal deletion (*i.e.*, the device would be programmed to cut the St. Louis signals on and off at prescribed times). It is unclear from this record whether the technicians were aware fully of the switcher's intended use and in any event their testimony as to the purpose underlying the purchase was contradicted by Hudson, whom the ALJ believed. In sum, the record evidence is insuffi cient to establish that Hudson had a culpable role in the carriage of the unlawful signals. We therefore affirm the ALJ's conclusion that the violations have no impact on Mid-America's requisite or comparative qualifications.

9. *Participation of Ownership and Management.* The Commission considers full-time participation in station operation by owners to be of substantial importance based on the presumption that it is inherently desirable that legal responsibility and day-to-day performance be closely associated. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909 (1965). Mid-America, which proposes to integrate its 83% stockholder, Larry Hudson, full-time as the station's general manager, was awarded a substantial integration preference based on its quantitative superiority over its competitors. I.D., para. 98. The quantitative percentages of the applicant's integration credit were as follows: (1) Mid-America — 83%

full-time; (2) Channel 15 — 51% substantial time (*i.e.*, 30 hours per week); (3) Family — 10% full-time and 21.75% part-time (*i.e.*, 20 hrs. per week); (4) Omaha TV — 15% full-time; and (5) Koplar — 0%. Both Family and Omaha TV argue that Mid-America's quantitative percentage should be diminished slightly, *i.e.*, to 58% or 66%, because of a notation in a Mid-America amendment filed May 27, 1980 referring to Hudson as a 58% partner, and because of a contention that a strong possibility exists that the other Mid-America principals will exercise stock options. Family would also narrow Mid-America's integration advantage based on the minority and female qualitative attributes of its integrated owner. In addition, Channel 15 argues that its 51% substantial integration proposal should be accorded only a slight integration disadvantage relative to Mid-America. The remaining exceptions contend that Channel 15's substantial integration proposal and Family's 10% full-time integration proposal should be disallowed.

10. We conclude initially that the ALJ properly awarded Mid-Amercia 83% quantitative integration credit. A review of its May 27, 1980 amendment shows that the 58% partner notation was an obvious error. The notation was included in a page setting forth Hudson's business and financial interests (Table II, Section II, page 4 of FCC Form 301), which had not been updated, and was contradicted by the express terms of the amendment which set forth Hudson's correct stock interest in the applicant corporation. See also Tr. 932. Furthermore, the suggestion that Mid-America's stockholders will exercise stock options is moot since the options apparently expired some years ago. See Mid-America Reply Br. at n. 5. Second, as to Channel 15, we conclude that it is not entitled to any integration credit. In *Bay Television, Inc.*, FCC 85-58, released March 25, 1985, at n. 2, the Commission held that integration credit would not be given where an owner "did not propose to work at the station on a daily basis." *See also KIST Corp.*, FCC 85-512, released September 24, 1985, at n.13. Here, John S. Tyler, Channel 15's 51% stockholder who proposes to work at the station 30 hours per week and upon whom Channel 15's integration credit is predicated, will live in Dallas, Texas and spend only three days per week at the Omaha station rather than participate daily as required to receive integration credit. Mid-America's 83% full-time integration credit is entitled to a substantial integration preference over Channel 15's 0% integration credit. *See Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 54 RR 2d 989 (Rev. Bd. 1983) (substantial integration preference for

84% full-time versus 0%).

11. Finally, we need not consider the exceptions relating to Family's integration proposal (disallowance of Family's 10% full-time integration credit and related exceptions thereto, and accreditation of a 8.5% part-time proposal) because its proposal even when viewed in its most favorable light (10% full-time, 30.25% part-time, qualitatively enhanced) is not sufficient to stave off the award of a substantial integration preference to Mid-America. *See Poet's Seat Broadcasting Inc.*, 78 FCC 2d 1080, 1083–1085, 47 RR 2d 1265, 1269 (Rev. Bd. 1980) (substantial integration preference — 74.9% versus 25%); *Radio Gaithersburg, Inc.*, 72 FCC 820, 827–829, 45 RR 2d 1709, 1714 (Rev. Bd. 1979) (substantial integration preference — 100% versus 15% full-time and 23% part-time); *see also Ruarch Associates*, 99 FCC 2d 338, 343, 56 RR 2d 1593, 1597 (Rev. Bd. 1984) (qualitative enhancements attributable to less than full-time integration proposals do not have an equal enhancing effect). And in light of our ultimate holding in this case, see para. 15, below, it is not necessary to make a comparative analysis of the integration rankings of the remaining applicants. The ALJ properly found that Mid-America is entitled to a substantial integration preference over each of its competitors.

12. *Diversification of Control of the Media of Mass Communications.* One of the primary objectives toward which the comparative process is directed is a maximum diffusion of control of the media of mass communications. *See Policy Statement, supra*, 1 FCC 2d 394, 5 RR 2d at 1908. Here, the I.D. found that (1) Family had an undisputable advantage over its competitors since it was the only applicant that was not attributed with any media interests, followed closely by (2) Channel 15, which owns AM and FM broadcast stations in Oklahoma City, Oklahoma (475 miles away) and for which Family received a slight diversification preference, and then by (3) Omaha TV, (4) Koplar, and (5) Mid-America in that order. I.D., para. 90. Family was given a slight to moderate diversification preference over Omaha TV whose minority stockholders (27%) have several scattered media interests throughout the United States, and moderate diversification preferences over Koplar, which owns two television stations 360 and 1375 miles away, respectively, and Mid-America which has controlling interests in a Topeka, Kansas television station approximately 150 miles away and in cable television systems in the adjoining states of Kansas and Missouri. *Id.* Family contends in its exceptions, apparently relying on *East St. Louis Broadcast-*

ing Co., 29 FCC 2d 170, 175, 21 RR 2d 992, 999 (1971), that because it has no other media interests, it is entitled to a substantial diversification preference over Mid-America, which Family points out, has recently acquired a 90% interest in another television station, at Crossville, Tennessee, that also should be weighed against it. Channel 15 also notes Mid-America's station and seeks a moderate diversification preference for itself over Mid-America. Channel 15 contends that Family, too, has attributable media interests, via the wife of Family's 32.5% principal, John H. Gayer, an interest Family conceded at oral argument (TR. 1703-1704), and via Gayer's son and daughter. Mrs. Gayer is a 31.25% stockholder in radio stations KBCR and KBCR-FM in Steamboat Springs, Colorado, located 650 miles away (Tr. 1701). The Gayer offspring are asserted to hold the remaining ownership of the Steamboat Springs stations stock. Channel 15's Exceptions to 6-7. Channel 15 argues that its diversification status is essentially equal to that of Family. Additionally, both Family and Omaha TV argue that Channel 15's ownership of a Satellite Music Network and a Satellite Radio Network should be considered under the diversification criterion.

13. We agree with the ALJ that none of the applicants is entitled to a substantial preference under the diversification criterion. The Commission generally considers media interests in the principal community proposed to be served to be of most significance, followed by other interests in the remainder of the proposed service area, and then in the United States. *See Policy Statement*, *supra*, 1 FCC 2d at 394-395, 5 RR 2d at 1908. Moreover, the weight to be given to such interests is directly related to the type of other media, size of the ownership interest, size of audience, number of facilities, etc. *See TRC Communications, Inc.* FCC 85R-84, released October 18, 1985. Here, all of the applicants have some media interests. Family, which has the most favorable comparative diversification posture, is attributed with John Gayer's derivative 10.16% interest (32.5% x 31.25%) in two radio stations located 650 miles away. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425-428, 49 RR 2d 606, 608-611 (1981) (presumption of common control of media interests between a husband and wife for diversification purposes).[3] And, Mid-

[3] We do not attribute Gayer's children's interests in the same facilities to Family because ownership of media interests by a relative not in privity with an applicant is generally considered to be immaterial. *See Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2138-2139, 44 RR 2d 127, 134 (Rev. Bd. 1978). Even if the additional interests were attributed to Family, however, it would have no discernible impact on Family's diversification position.

America, which was ranked last by the ALJ under this criterion, has, through its majority stockholder, controlling interests in two television stations — one approximately 150 miles away and the other more than 750 miles away (official notice taken on the basis of the Rand McNally Road Atlas) — and attributable interests in cable television and master antenna television systems serving approximately 16,000 subscribers (Tr. 1726) in the nearby states of Kansas and Missouri. *See Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 985, 55 RR 2d 926, 928 (1984) (subsequently acquired media interests considered under diversification criterion); *Lorain Community Broadcasting Co.*, 14 FCC 2d 604, 606, 14 RR 2d 155, 158–159 (Rev. Bd. 1968) (cable television systems treated as media of mass communications). The other three applicants all have media interests more substantial than that of Family.

14. While Family is correct that under *East St. Louis Broadcasting Co., Inc., supra*, a substantial diversification preference was awarded to an applicant with no media interests over a competing applicant with regional interests, the Board has recently observed that "the Commission's uniform tendency in the last 10 years has been to reserve substantial diversification preferences for situations in which the other applicants have in-town media interests . . . ." *Focus Television Co.* 98 FCC 2d 546, 553, 56 RR 2d 1335, 1340 (Rev. Bd. 1984). In *Focus, supra*, the Board awarded an applicant with no media interests a moderate diversification preference over another applicant which had extensive out-of-state interests in radio and television stations, cable television systems, and other mass media. And in *Phoenix Media Corp.*, 56 RR 2d 1241 (Rev. Bd. 1984), the Board awarded a moderate diversification preference to an applicant with no media interests over one with controlling ownership interests in four in-state broadcasting stations. Here, neither Mid-America nor any of the other applicants has media interests in the proposed community. Thus, the ALJ's award of a moderate preference to Family relative to Mid-America, based on the proximity of the Topeka television station and the several cable interest in Missouri and Kansas, is, if anything, a bit too heavy. In view of the fact that the broadcast ownership interests were more numberous in *Focus* and *Phoenix* and entirely in-state in the latter, the award here should probably be reduced somewhat to *slight to moderate*. The additional acquisition of a television station located more than 750 miles away and a greater ownship percentage in the Topeka station and the cable systems, see para.

16, below, would not increase the preference significantly because ofthe distance of the new station, because the Mid-American principals already had a controlling interest in the Topeka station and the cable systems, and because Family has a lesser attributable interest in an AM-FM combination which was not considered by the ALJ. Family is entitled therefore to a slight to moderate diversification preference over Mid-America. We need not consider the other exceptions pertaining to Family's diversification advantage over Omaha TV and Channel 15 since those applicants cannot in any event prevail over Family or Mid-America.

15. *Final Comparative Evaluation.* The final comparative evaluation turns on whether Mid-America's substantial integration preference is outweighed by Family's slight to moderate diversification preference. No preferences on other comparative criteria have been awarded or demerits imposed, and Koplar's Exhibit No. 2, which was rejected by the ALJ and which purportedly shows the popularity of its currently operated television station in St. Louis, does not (as conceded by Koplar) set forth the type of showing necessary to receive a preference for an unusually good past broadcast record. *See Policy Statement, supra,* 1 FCC 2d at 398, 5 RR 2d at 1912-1913. In accordance with Commission precedent, the ALJ pointed out that while diversification normally prevails over integration, that is not always the case and certainly not the rule when the diversification advantage is considerably less than substantial and is outweighed by a more significant integration advantage. *See Gilbert Broadcasting Corp.,* 52 RR 2d at 728-729, 54 RR 2d at 1000; *Cleveland Television Corp.,* 91 FCC 2d 1129, 1143, 52 RR 2d 581, 591 (Rev. Bd. 1982). We affirm the ALJ's conclusion that Mid-America's substantial integration preference, and "all it bodes for the 'best practicable service' to the public," *id.,* is of sufficient magnitude to overcome Family's slight to moderate diversification preference and to justify an overall comparative edge to Mid-America.

16. *Motion to Enlarge Issues.* On April 1, 1985, Family filed a motion requesting the addition of reporting (Section 1.65), ineptness, and financial issues against Mid-America based upon allegations that Mid-America failed to amend its application to report first the bankruptcy of its Topeka television station and various shareholder actions with respect thereto resolved adversely to Larry Hudson, and second an increase in Hudson's media holdings, (a) 100% in Station WINT-TV, Crossville, Tennessee, up from the 90% ownership interest reported in a then-pending application referenced by the I.D. in n. 29; (b)

controlling interest in Station KLDH-TV, Topeka, Kansas, up from the interest reported in the I.D., *i.e.*, "controlling interest" by the "three principals" of Mid-America; (c) 100% interest in Cablevision of Jefferson County, Inc., a cable television system serving St. Louis, Missouri, up from the 60% interest indicated in the I.D., and (d) two businesses not previously named, STL Cablevision Partners and LDH, Inc. Family contends that the withheld information materially affects the outcome of the proceeding because the additional media holdings adversely impact on Mid-America's diversification demerit and because the bankruptcy raises both a financial question (Hudson's ability to contribute financially to the Omaha station) and an effectuation question (whether Hudson's status as debtor in control of a troubled station will permit him to fulfill his integration commitment to the Omaha station). Family adds that in light of these omissions, an ineptness or carelessness issue should also be specified against Mid-America.

17. The motion will be denied. Turning to the bankruptcy matters first, we agree with Family that technically the bankruptcy should have been reported in this proceeding because the old application form used in this case called for this type of information, although the new revised form does not. However, decisionally, the bankruptcy had no bearing on Mid-America's financial qualifications. Earlier in the proceeding, the ALJ had issued a summary decision (FCC 81M-1700, released June 3, 1981) finding Mid-America financially qualified after Mid-America had amended its application to show that it was relying upon a $2,000,000 loan from Tele-Communications, Inc. and $16,000 in existing capital to meet its estimated construction and three month operation costs of $1,620,800. Thus, Mid-America's financial qualifications do not depend upon Hudson's ability to contribute financially to the station. Moreover, Mid-America asserts that its failure to disclose was inadvertent and the lack of intent to deceive is confirmed by the fact that the information relating to the bankruptcy has been on file with the Commission since the licensee of the Topeka station filed its application for consent to transfer the station to a trustee in bankruptcy. *See Superior Broadcasting of Calif.*, 94 FCC 2d 904, 910, 54 RR 2d 773, 777 (Rev. Bd. 1983). *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 948, 50 RR 2dd 1143, 1145 (Rev. Bd. 1982) (no issue added for unreported bankruptcy and no demerit assessed). Finally, the suggestion that Hudson may not be able to fulfill his integration commitment to the Omaha station because of the

precarious status of the Topeka station is based on nothing other than sheer speculation and is contradicted by Hudson's express commitment to work at the station on a full-time basis. Thus, Family has not presented a sufficient showing to warrant addition of an issue.

18. Nor are we convinced that the revisions in Hudson's media interests are sufficient to justify further evidentiary hearings. The ALJ's diversification analysis effectively took into account all of the media interests cited by Family's motion to enlarge with the exception of Station WINT-TV, Crossville, Tennessee, which had not then ripened into an attributable interest. See I.D. n. 29. And that station, located more than 750 miles away from Omaha, had only a minor impact on Mid-America's diversification posture when actually acquired. See para. 14, above, of this Decision. The alterations in the ownership percentage held by Hudson in the cable systems and in Station KLDH-TV, Topeka (as well as Mid-America's elimination of this interest by transfer to a bankruptcy trustee) technically should have been timely reported and when coupled with the failure to report the bankruptcy, perhaps might warrant a slight comparative demerit, *see Superior Broadcasting of Calif. supra.* However, because their impact, and the impact of the two new businesses, LDH, Inc. (a company originally formed to acquire the Topeka station from the trustee) and STL Cablevision (a cable franchisee in St. Louis not yet constructed or operational) are *de minimis* on Mid-America's diversification position, and the bankruptcy was nondecisional, any demerit assessed would not be sufficient to change the ultimate result in this proceeding. Thus, we will not add a reporting or an ineptness issue. *See Merrimac Valley Broadcasting, Inc.* 55 RR 2d 23 (1983), as modified by 99 FCC 2d680, 683-684 n.9, 57 RR 2d 713, 716 n. 9; *Badlands Broadcasting Co.*, 37 RR 2d 416 (1976).

19. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Omaha TV 15, Inc., Mid-America Broadcasting, Inc., Koplar Communications, Inc., and Family Television, Inc. on January 31, 1984, April 30, 1985 as supplemented on May 1, 1985, and June 20, 1985, respectively, ARE GRANTED, and the amendments ARE ACCEPTED; and that the Motion to Enlarge Issues Pertaining to Mid-America Broadcasting, Inc. filed April 1, 1985, by Family Television, Inc. IS DENIED; and

20. IT IS FURTHER ORDERED, That the application of Mid-America Broadcasting, Inc. (File No. BPCT-791026KN) for authority to construct a new television station at Omaha, Nebraska IS GRANTED, and the applications of Omaha TV 15, Inc. (File No. BPCT-790629KG), Channel 15/Omaha (File No. BPCT-790409KE), Koplar Communications, Inc. (File No. BPCT-790703KF), and Family Television, Inc. (File No. BPCT-790627KE), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

In the main, I concur with my colleagues, but write to highlight the matters discussed in paragraphs 16–18, *ante*, the shoulders of which discussion the Commission may wish to peer over. The first matter concerns Mid-America's failure to report in this proceeding the bankruptcy of KLDH-TV, Channel 49, Topeka, Kansas. KLDH is licensed to Mid-America Broadcasting of Topeka, the controlling principals of which coincide with the winning applicant in this case.[1] The second, although derivative matter, concerns the proposal of Mid-America's controlling shareholder, Larry D. Hudson, to integrate fulltime as General Manager of this Omaha television station, *see ante* para. 9, at a time in which Mr. Hudson has successfully petitioned the bankruptcy court and the Commission to "re-acquire legal control of [KLDH-TV, Topeka Kansas] from the [bankruptcy] trustee."[2] Hudson has proffered his implicit pledge to both federal authorities to seek in the fullest the revivification of KLDH-TV.

Mid-America's glib response to its failure to report the bankruptcy of its sister interest, Mid-America of Topeka, is thus[3]:

> The current version of F.C.C. Form 301, adopted several years ago, deleted the requirement that applicants disclose the pendency of voluntary and involuntary bankruptcy proceedings. (Form 301, Jan. 1982). Since the Commission has determined that it is no longer interested in that sort of information, Mid-America was under no obligation to report it here.

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[1] *See Family Television Motion to Enlarge* at 2–9.

[2] Mid-America Opposition to Enlargement at 8. The "LDH" portion of the bankrupt Topeka TV station's call letters presumably signifies its controlling principal, Larry D. Hudson.

[3] *Id.*, at 6 (footnote omitted).

That assertion demonstrates a stark ignorance of the law (no excuse), and Mid-America is saved from a potentially disqualifying demerit only because the KLDH-TV bankruptcy *was* reported to the FCC in connection with the Topeka station's permit, *see ante* para. 17.[4] Section 1.65 of the Commission's rules, 47 CFR § 1.65, requires the immediate report of any matter that could be of decisional significance. *See RKO General, Inc.* v. *FCC*, 670 F. 2d 215, 229 (D.C. Cir. 1981). We have recently reiterated that bankruptcies involving construction permit applicants or their principals must be reported. *Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 398-402 (Rev. Bd. 1984) (applicant disqualified for intentional failure of 25% principal/vice president to report bankruptcy), *aff'd in pertinent part*, FCC 85-501, released September 16, 1985 (Comm'n). This is not new law. *See Nuance Corp.*, 85 FCC 2d 412, 416-417 (Rev. Bd. 1981) (demerit assigned for failure to report outstanding judgment). And, we have recently remanded a proceeding because, in part, an applicant principal failed to report the imposition of federal tax liens. *Las Americas Communications, Inc.*, FCC 85R-54, released June 28, 1985.[5]

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[4] We have held that, where critical information has already been reported to the Commission — albeit in another context — no intent to deliberately deceive the agency can be considered likely. *Superior Broadcasting of California*, 94 FCC 2d 904, 908-910 (Rev. Bd. 1983) (slight demerit for reporting violations).

[5] Mid-America's erroneous contention that the Commission is "no longer interested" when a broadcast construction permit applicant is elsewhere financially embarrassed is similar to the error of our ALJ in both *Las Americas*, *supra* and *T. P. Communications, Inc.*, FCC 84M-4524, released October 24, 1984. In the latter case, the ALJ opined that "[t]his Commission is no longer concerned whether its licensees are financial deadbeats or not," apparently misreading *Arizona Mobile Telephone Co.*, 93 FCC 2d 1147, 1154 (1983). *See Further Prehearing Order*, FCC 85M-2718, released July 8, 1985 (ALJ) (*Las Americas* remand).

Arizona Mobile stands for no such proposition regarding broadcast construction permit applicants. Indeed, in that case, the Commission carefully and deliberately distinguished *broadcast* proceedings; and, citing prior cases, it stated:

> Moreover, in our view, *Country Broadcasting* and *Noble Broadcasting* do not mandate the denial of Starer's applications. In *Noble Broadcasting* we terminated a proceeding without disqualifying the applicant even though there had been a repeated failure to remit withheld taxes. In *Country Broadcasting* the Board designated an issue which could impact on either the basic or the comparative qualifications of the applicant.[28] More significantly, however, the *Country Broadcasting* and *Noble Broadcasting* proceedings involved *broadcast applications* and as such are distinguishable from the instant DPLMRS proceeding. As we noted in *Cablecom-General, the fundamental differences between broadcast and DPLMRS proceedings require different standards*, and misconduct which could reflect adversely on the character qualifications of *broadcast applicants* would not have the same

Mid-America's cavalier attitude in this proceeding towards its § 1.65 responsibilities could have been fatal, even without the finding of an intent to deceive. While it is said that "an army travels on its stomach," both the Commission and the *RKO General* court have emphasized that a small bureaucracy such as the FCC — with few internal resources — must travel on information provided by regulatees. As we stressed in *Fox River Broadcasting, Inc.* 88 FCC 2d 1132, 1136-1137 (Rev. Bd. 1982), *modified*, 53 RR 2d 44 (1983) (Comm'n), the duty imposed by § 1.65 goes beyond the stricture against misrepresentation (*see* 18 U. S. C. § 1001), but compels a licensee to avoid omitting the filing of information that may have a decisional bearing in a licensing action.[6] Applicants have long been admonished to err on the side of completeness; the "confession and avoidance" practice of the common law is the burden of § 1.65, not the reticence of Mid-America here.[7]

Reservations are also unavoidable here because the fulltime integration pledge of Larry D. Hudson may well conflict with his obligation to the federal bankruptcy court to put KLDH-TV back on its feet in Topeka, so that the Kansas station's creditors do not suffer devastating loss. Hudson's petition to the FCC to have

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impact on the qualifications of DPLMRS applicant.

93 FCC 2d at 1154-1155 (emphasis added). In the referenced footnote 28, the Commission emphasized that, although "a failure to pay taxes is not, *per se*, disqualifying . . . it is one factor to be considered as part of the entire licensing process." *Id.*, at n. 28.

Thus, financial difficulties must be reported; we will then consider an applicant's explanation to determine the impact on its fitness for licenseeship.

[6] After reversing the Commission on two of its three grounds for non-renewal of WNAC-TV (Boston), the *RKO General* court expounded at great length on the criticality of § 1.65, *see* 670 F.2d at 229-230, and it held that even where the licensee had filed complete information with the federal government in another context (in that case a confidential S.E.C. proceeding), the licensee nonetheless had an obligation to be more forthcoming in the specific licensing proceeding at the FCC bar. The *RKO General* court stated:

> It is also *unnecessary* to show that RKO officials had actual knowledge in early 1976 of the improprieties and illegalities to which General Tire later admitted, *or that RKO officials willfully intended to misrepresent these facts to the FCC.*

670 F.2d at 230 (emphasis added). Intent to deceive aside, the court found that the vital point was that the FCC not "be deprived of . . . information." *Id. But cf., Fox River Broadcasting, Inc.*, 53 RR 2d at 46 n. 10 (Comm'n modification of Rev. Bd. decision) (dictum suggesting "the [RKO] court recognized the element of deception there").

[7] *Cf. WHW Enterprises, Inc.* v. *FCC*, 753 F. 2d 1132 (D.C. Cir. 1985) (winning applicant up-ended because of failure to be fully forthcoming as to asset ownership).

KLDH-TV re-licensed to him may likewise imply a dedication to place that troubled station into public service. The Board has stated that a fulltime integration pledge connotes virtually a "total immersion" into the management of a station, especially of an embryonic UHF television station where — as witness the fate of KLDH-TV — successful continuance of service to the public is far from assured. For that reason, the Commission may wish to delve further into Mr. Hudson's representations to the bankruptcy court, or otherwise consider whether to honor the fulltime management integration pledge of a controlling applicant principal whose time might be better (or actually) spent effectuating the construction permit of the floundering television station he *already* holds.

FCC 83D-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Omaha TV 15, Inc. Omaha, Nebraska	BC Docket No. 80-691 File No. BPCT-790629KG
Channel 15/Omaha (Formerly Sun Broadcasting, Inc.) Omaha, Nebraska	BC Docket No. 80-693 File No. BPCT-790409KE
Mid-America Broadcasting, Inc. Omaha, Nebraska	BC Docket No. 80-694 File No. BPCT-791026KN
Koplar Communications, Inc. Omaha, Nebraska	BC Docket No. 80-695 File No. BPCT-790703KF
Family Television, Inc. Omaha, Nebraska	BC Docket No. 80-696 File No. BPCT-790627KE
For a Construction Permit for a New Television Station	

Appearances

Reed Miller, Elizabeth R. Costle, David H. Lloyd and *William H. Crispin*, on behalf of Omaha TV 15, Inc.; *Harry F. Cole, Thomas Schattenfield, David F. Tillotson* and *Gerald E. Oberst, Jr.*, on behalf of Channel 15/Omaha; *John A. Borsari, Leo I.*

George, Donald J. Evans, Robert A. Rich and *Gerald Scher,* on behalf of Mid-America Broadcasting, Inc.; *Herbert D. Miller, Jr.,* on behalf of Koplar Communications, Inc.; *Michael L. Glaser* and *Elliott Schnitzer,* on behalf of Family Television, Inc.; and *Joseph Belisle,* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: August 29, 1983; Released: September 9, 1983

Preliminary Statement

1. This proceeding involves mutually exclusive applications filed by Omaha TV 15, Inc. (Omaha TV 15), Katz Broadcasting Corporation of America (Katz),[1] Channel 15/Omaha (Channel 15),[2] Mid-America Broadcasting, Inc. (Mid-America), Koplar Communications, Inc. (Koplar)[3] and Family Television, Inc. (Family Television) for a construction permit for a new commercial television station to operate on Channel 15, Omaha, Nebraska.

2. The Hearing Designation Order was released on November 5, 1980 (BC 1055) and the following issues were designated for hearing.

(1) To determine whether Omaha TV 15, Inc., has proposed programming designed to be responsive to the needs and interests of its community of license; and if not, whether it is qualified.[4]

(2) To determine whether Mid-America Broadcasting, Inc., has the additional $1,046,800 necessary to construct and operate its proposed station; and if not, whether applicant is financially qualified.[4]

(3) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By *Order* released May 25, 1982, the following issues were

[1] By Order released March 16, 1982 (FCC 82M-0843), Katz's application was dismissed with prejudice.

[2] Channel 15/Omaha is the successor to Sun Broadcasting Company, the original applicant in this proceeding.

[3] Koplar Communications, Inc. is the successor to 220 Television, Inc., the original applicant in this proceeding (FCC 81M-3069, released September 25, 1981).

[4] Issues 1 and 2 were resolved favorably to Omaha TV 15 and Mid-America, respectively, by *Order* released June 3, 1982 (FCC 81M-1700).

added:

(3) To determine the effect of the resolution of the issues specified in *Alan K. Levin*, FCC 82M-0860, released March 17, 1982, upon the basic or comparative qualifications of Family Television, Inc.

(4) To determine the effect of Larry D. Hudson's role in Jackson Cable TV's violations of the Commission's CATV signal carriage rules upon the basic or comparative qualifications of Mid-America Broadcasting, Inc. to be a licensee of the Commission.

(5) To determine whether Larry D. Hudson as Chief executive officer of Crest Antenna Systems, Inc. violated and/or conspired with others to violate Section 605 of the Communications Act and what effect such violations have upon the basic or comparative qualifications of Mid-America Broadcasting, Inc. to be a licensee of the Commission.[5]

The burdens of proceeding and proof on added issue (4) was placed on Mid-America. The burden of proceeding on added issue (5) was placed on Omaha TV 15 and the burden of proof on that issue was placed on Mid-America.

4. Pre-hearing conferences were held January 8, February 12, May 12, June 6, 1981 and January 15, 1982. An admission session was held on March 26, 1982. Hearing sessions and conferences were held March 29-31, May 7, May 13, May 21, July 2, August 10-11 and September 7, 1982. The record was closed by *Order* released September 17, 1982 (FCC 82M-2873). Proposed findings of fact and conclusions of law were filed by the applicants on December 11, 1982 and reply findings and conclusions were filed on January 3, 1983.

Findings of Fact

Qualification Issues

Issue 3 — Levin Issue

5. John H. Gayer, who owns 32.5% of Family's stock, was also a principal in Eagle Radio, Inc. (Eagle), applicant for a radio station in Vail, Colorado.[6] Eagle's application, together with a number of other applications, were designated for hearing by *Memorandum Opinion and Order*, 45 Fed. Reg. 85512, December

[5] These issues will be numbered 3-5 and present issues 3 and 4 will be renumbered 6 and 7.

[6] Eagle's application was dismissed pursuant to a settlement agreement. See FCC 82M-2499, released August 19, 1982.

29, 1980.[7] By Order released March 17, 1982 (FCC 82M-0860), the following issues were added in the *Levin* proceeding:

> To determine whether the principals of Summit Radio, Inc. filed false affidavits in response to Alan K. Levin's Petition To Dismiss Application and whether John H. Gayer gave false testimony under oath regarding his role in merger negotiations with Alan K. Levin and if so, the effect thereof on the basic and comparative qualifications of Eagle Radio, Inc. and Summit Radio, Inc.
>
> To determine whether Eagle Radio, Inc., Grand Radio, Inc., Summit Radio, Inc., and/or its principals misrepresented facts concerning intra-Gayer family stock transfers in documents filed with the Commission or was lacking in candor concerning these transactions and, if so, the effect thereof on the basic and comparative qualifications of Eagle Radio, Inc., Grand Radio, Inc., and Summit Radio, Inc.

In his *Initial Decision* released July 18, 1983 (FCC 83D-39), the Presiding Judge in *Levin*, who is also the Presiding Judge in the *Omaha* proceeding, resolved the first added issue in favor of Summit Radio, Inc. and John H. Gayer (*Initial Decision*, paragraphs 127-128); and also resolved the second added issue in favor of Summit Radio, Inc., Grand Radio, Inc., their respective principals, and John H. Gayer (Initial Decision, paragraphs 129-135). Consequently, resolution of the issues specified in the *Levin* proceeding has no bearing on the basic or comparative qualifications of Family.

Issue 4 — Jackson Cable TV Issue

6. In late 1974, Jackson Cable TV, Inc., was franchised by the city of Jackson to construct and operate a cable television system in that city. Larry D. Hudson, President, Director and owner of over 80% of Mid-America's stock held a controlling interest in the corporation (Mid-America Exs. 1, 5). Jackson is a small town in eastern Missouri near Cape Girardeau, approximately 90 miles from St. Louis. Because of its location, it falls within the Cape Girardeau, Missouri — Paducah, Kentucky — Harrisburg, Illinois television market. In the latter 1970's Jackson had a population of about 5900 people. Its cable subscribership was approximately 1,000, raising to a maximum of about 1,300 (Mid-America Ex. 1, p. 1).

7. In about November of 1975, Jackson Cable TV, Inc. assigned its interest in the Jackson cable system to a partnership. That partnership, called Jackson Cable T.V., was owned 50% by

[7] The application of Alan K. Levin, applicant for a station in Dillon, Colorado was the lead docket.

Jackson Cable TV, Inc.[8] and 50% by ten local individuals, each of whom owned a 5% interest. Since Hudson directly or indirectly owned approximately a 60%-80% interest in the corporate partner, his equity interest in the partnership consisted of approximately 30%-40%. Under the partnership articles, Jackson Cable TV, Inc. had only one out of eleven votes on partnership matters (Mid-America Ex. 5, p. 13; Tr. 1393-94, 1651). Its voting interest was therefore identical to those of each of the 5% partners. Hudson controlled the vote of Jackson Cable T.V., Inc. Hudson was designated the managing partner, subject to removal by 60% of the partners (Mid-America Ex. 5).

8. The partnership articles provided that the managing partner was in "full charge of the partnership business in all respects and in all matters .... " (Mid-America Ex. 5, pp. 13-14). However, many decisions were in fact made by the partners. Major decisions such as whether or not to borrow money, whether to terminate employees, whether to enter long-term contracts, etc. were discussed and passed upon by the partners. One of the local partners handled the books and accounting of the partnership, and another local partner, Mr. Bockhorst, also took an active role in partnership affairs. Unlike the local partners, Hudson did not live in Jackson, Missouri (Mid-America Ex. 5).

9. Construction of the Jackson system commenced in early 1975 and it was turned on in approximately December 1975. In addition to the signals applied for and approved in Jackson Cable TV Inc.'s certificate of compliance application, the signals of three St. Louis network affiliates (KMOX-TV, KTVI, and KSD-TV were carried (Mid-America Ex. 5, p. 1).

10. By letter of January 27, 1976, Hudson was advised by his communications counsel that non-certified signals could be carried by a cable system under certain circumstances without prior Commission approval. Counsel recited, among others, that such signals could be carried when local stations had signed off for the day or the local time limit is reached and when network programs are not carried by a local affiliate (Mid-America Ex. 5, p. 7-9). The cable system purchased a state of the art Jerrold automatic switching device at a cost of approximately $7,000-$8,000 for the purpose of automatically cutting off signals, such as the St. Louis network affiliates' signals, at times when they were not to be carried vis-a-vis the local network affiliates. The switching device operated by an electric timer that cut on and off at pre-set

[8] At some point the name of Jackson Cable T.V., Inc. may have changed to Cape County Cable T.V., Inc. The original name is used here throughout.

times (Mid-America Ex. 5, p. 2; Tr. 1358). It was Hudson's intention, in purchasing and using the switcher to carry the St. Louis network signals only in compliance with the Commission's rules as they then existed (Tr. 1547). The switcher was in place and programmed in March–April 1976 (Tr. 1402, 1428, 1615).

11. The switcher was activated in the spring of 1976 and was shut off in the fall of 1976 (Tr. 1383, 1403, 1405, 1416).[9] The switcher was on a rural electrical power system which was subject to frequent short-term power outages, lightning surges, etc. Because the electric power was often off, the timing of the switcher would be thrown out of kilter, causing it to cut signals on and off at the wrong times. The device failed on an almost daily basis from the time it was activated (Mid-America Ex. 5, p. 2; Tr. 1406, 1636).

12. As manager of the system, Hudson was not present in Jackson on a day-to-day basis (Tr. 1620–21). When the system first became operational in early 1976, Hudson visited Jackson approximately three days each month. After the system became established, he visited it approximately once a month. He did not order the abandonment of the use of the switching device and was not aware of it until around the latter part of 1976 (Mid-America Ex. 5, p. 4; Tr. 1411, 1429). Jones was responsible for turning the switcher on or off and Hudson never told Jones to turn off the

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[9] Jerald Jones was employed as a technician with the cable system beginning in March 1976 and replaced Hudson as manager in the spring of 1977 (Tr. 1610, 1627). Jones' testimony varies in certain respects from that of Hudson's. However, Jones' testimony demonstrates a lack of clear recollection and can not be relied on. Jones initially testified that he believed the switcher was not initially activated until the fall of 1976 (Tr. 1623). However, Jones' later testimony makes clear that his belief rested on his assumption that the 500 subscriber point was reached in the fall of 1976 (Tr. 1648). Extrinsic evidence, which is undisputed makes clear that the 500 subscriber point was actually reached in May or June 1976 (Omaha TV 15 Ex. 23) which is consistent with Hudson's recollection of when the switcher was turned on (Tr. 1383). Jones' recollection as to when the switcher was turned off is also faulty. Jones testified that the switcher was operating in May 1977 when he became manager (Tr. 1646) and that the switcher was terminated either in 1977, 1978 or 1979 (Tr. 1649, 1663). Jones is also unable to recall even the year of the meeting when he was instructed by the partners to carry network signals without interruption (Tr. 1651, 1654) and whether the meeting concerning carriage of the St. Louis signals took place before or after he became manager (Tr. 1655). Rick Haupt, the other Jackson Cable TV technician called as a witness testified that the switcher was turned on approximately two to three months after he began employment which was May 1976 (Tr. 1670). Thus, Haupt's testimony is consistent with the time frame stated by Hudson and also disputes Jones' initial testimony that the switcher was not turned on until the fall of 1976. Haupt recalled that at some point the switcher was turned off, but could not say in which year that took place (Tr. 1670–72).

switcher (Tr. 1412, 1452).

13. In late October 1976, Hudson was contacted at his office in Chanute, Kansas, by a Mr. Paxton, a principal of WPSD-TV, Paducah, Kentucky. Paxton advised Hudson that Jackson was carrying unauthorized signals. Hudson told Paxton that a meeting of the Jackson Cable TV partners was scheduled for December and if what Paxton said was true, Hudson would consider resigning as managing partner (Mid-America Ex.5, p. 4). Hudson also advised Paxton that there had been frequent breakdowns of mechanical switches (Omaha TV 15 Ex. 33). Hudson learned either as a result of the phone call or contemporaneously with the phone call that the switcher had been abandoned (Tr. 1554-56). In the intervening period before the December meeting, Hudson tried unsuccessfully to get his partners to agree to activate the switcher and try to make it work by using a second power source or some other means (Tr. 1557-60, 1573). Hudson felt it was futile for him to turn the switcher on since his partners could have it turned off as soon as he left Jackson to return to Chanute (Tr. 1557-58).

14. A meeting of the Jackson partners was held on December 14, 1976, and the subject of the St. Louis network signals was discussed. At the meeting, the partners were advised that there was a possibility of a constitutional challenge to the Commission's distant signal carriage rules. The partners were also aware that there was a strong sentiment among the subscribers to the Jackson system for carriage of programming from their home state rather than from Paducah, Kentucky and Harrisburg, Illinois, which were more than sixty miles away. The partners decided to continue carriage of the St. Louis signals while requesting special relief from the Commission (Mid-America Ex. 5, pp. 4-5, 26).

15. Hudson does not recall attending the December meeting (Tr. 1453, 1561). After this meeting, Earley, one of the Jackson partners who was a certified public accountant, wrote Hudson that the Jackson partners had "unanimously" approved a motion directing Hudson as managing partner not to cut off any channels currently carried by the Jackson system. (Mid-America Ex. 5 at 26). Hudson sent a copy of this letter to his counsel on December 23, 1976, stating that his only option was to carry out the wishes of the partners or resign (Mid-America Ex. 5, p. 27). On May 27, 1977, Hudson was removed as managing partner and Jerald Jones was made manager effective June 1, 1977 (Mid-America Ex. 5, pp. 5, 27). Hudson had no further control over the management or

direction of the system from that time (*Id.*). In this connection, Jones states that after he became manager, he no longer reported to Hudson and Hudson did not give him any orders (Tr. 1637).

16. On June 8, 1977, the Federal Communications Commission released an Order to Show Cause initiating a proceeding against Jackson for violation of the Cable Television Rules. See *Jackson Cable TV,* 64 FCC 2d 925 (1977). The Commission stated in that Order that there was reason to believe that Jackson was carrying without authorization the signals of Stations KTVI (ABC, Channel 27), KMOX-TV (CBS, Channel 4), and KDS-TV (ABC, Channel 5) from St. Louis, Missouri (hereinafter referred to as the St. Louis network stations or signals). See *Jackson Cable TV,* 69 FCC 2d 1724, 1725 (1978) (Omaha Ex. 20).

17. On January 9, 1978, Administrative Law Judge Daniel M. Head released his Summary Decision. *Jackson Cable TV, supra,* 69 FCC 2d 1724 (1978) (Omaha TV 15 Ex. 20). The decision was made on the basis of a joint stipulation of facts, responses to interrogatories and requests for admissions, and on documents from the files of the Commission submitted with the Cable Television Bureau's Motion for Summary Decision (Omaha TV 15 Exs. 23-25).[10] Judge Head concluded as a matter of law that Jackson violated Section 76.11 of the cable television rules[11] by adding the St. Louis network signals without obtaining the required certificate of compliance from the Commission. *Id.* at 1731. The Judge also found that Jackson violated Section 73.63 of the cable television rules by carrying the St. Louis network affiliated signals without a waiver of the rules. The Judge noted that such a waiver had been specifically denied to Jackson in the decision in *Jackson Cable TV,* 64 FCC 2d 920 (1977). He then concluded that "in light of Jackson's knowledge of the Commission's television rules, its knowledge of commencement of carriage

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[10] The interrogatories were answered by Jones as acting general manager of the partnership (Omaha TV 15 Ex. 23, p. 14; Omaha TV 15 Ex. 24, p. 8). Similarly, Jones provided the answers to the request for admission (Omaha TV 15 Ex. 25, p. 10). The documents were received only for the limited purpose of showing what material was relied on in rendering the decision and not as an admission against Hudson or Mid-America (Tr. 1595-96).

[11] At the time of that decision, that section of the rules provided that a system community unit with 50 or more subscribers, constituting part or all of a cable community system of 500 or more subscribers, should not add a television broadcast signal to existing operations unless it received a certificate of compliance from the Commission. 47 C.F.R. § 76.11 (1977). At the time Jackson commenced carrying the signals, a certificate of compliance was required for any system having over 50 subscribers. 47 C.F.R. § 76.11 (1976) (Omaha TV 15 Ex. 38). Jackson reached its 50th subscriber during April 1976 (Omaha TV Ex. 20).

of Stations KTVI, KMOX-TV, and KSD-TV, and its knowledge that a waiver was needed for carriage of these TV signals, ... Jackson knowingly and willfully violated the cable television rules." He ordered the entry of a cease and desist order requiring Jackson to terminate immediately the carriage of the St. Louis network affiliated stations. *Id.* at 1731. This decision was affirmed on appeal by the Review Board in a decision released May 2, 1978. See *Jackson Cable TV,* 69 FCC 2d 1717 (1978) (Omaha TV 15 Ex. 21). In its appeal, Jackson did not dispute the Judge's findings of fact but challenged the decision on first amendment grounds only. *Id.* at 1720-21.[12]

18. In late 1979, Crest Communications, Inc., a company controlled by Hudson, bought out the interests of the other partners in Jackson Cable TV. Immediately upon acquiring control of the company, Hudson directed that carriage of the St. Louis network signals should cease (Mid-America Ex. 5, p. 6). The decision to drop these signals was made jointly by Telecommunications, Inc. (TCI) and Hudson (Tr. 1494). TCI had financed Hudson's acquisition of the Jackson and other cable television systems and took over the day-to-day management of those systems from Hudson in mid-1979 (Tr. 1489-92). TCI also provided programming to Hudson's cable systems (Tr. 1515). TCI also held a proxy right to control the board and to buy 50% of the corporation's stock. TCI eventually bought Crest Communications including the Jackson system in 1981 (Tr. 902, 938-39, 1504).

Issue 5 — Section 605 Issue

19. In October 1982, Aircapital Cablevision, Inc. filed an amended complaint naming Crest Antenna Systems, Inc. (Crest) and Larry D. Hudson among others as defendants in a lawsuit alleging violations of Section 605 of the Communications Act (Omaha TV 15 Ex. 16). The complaint alleged that *inter alia*: (1) Crest, Larry D. Hudson and other defendants had commenced operation of their cable television equipment on or about August 21, 1981 and had unlawfully intercepted and distributed the HBO, Nickelodeon and ESPN programs to residents of the Colonial Mobile Home Park; (2) Crest, Larry D. Hudson and the other

[12] The Review Board's decision was subsequently appealed to the Commission, which eventually dismissed it as moot because of the repeal of the distant signal carriage rules. *Jackson Cable TV,* FCC 82-36, released January 22, 1982 (Mid-America Ex. 7).

defendants had no authorization, contract or other right to receive or distribute the HBO, Nickelodeon and ESPN program service;[13] (3) these same defendants were planning to commence operation of their cable television equipment at Parktowne Mobile Home Park and Olde English Manor Apartments; (4) that by receiving and distributing the HBO, Nickelodeon, ESPN and other program services without authorization, the defendants were in violation of the Federal Communications Act, 47 U. S. C. § 605 (Omaha TV 15 Ex. 16, pp. 19-22). The complaint is being contested by the defendants (Mid-America Ex. 6, p. 1).

20. Since approximately August of 1980, Crest Antenna Systems, Inc. has been in the business of providing Master Antenna Television service to mobile home parks and apartment buildings. Crest is wholly owned by Thayer Communications, Inc. and is controlled by Larry Hudson, who is its President. The company is managed on a day-to-day basis by Robert Livingston, its general manager. Crest operates by supplying to small numbers of subscribers, for a monthly fee, television broadcast signals receivable off-the-air and television signals receivable off of satellites via satellite earth stations. The alleged § 605 violations concern the signals received from satellites (Mid-America Ex. 6, p.1).

21. Crest has no direct agency contracts with various programming suppliers such as HBO, ESPN and Cable News Network (Tr. 1502). Crest receives and distributes the signals of HBO, ESPN, and CNN pursuant to agency agreements with an affiliate of TeleCommunications, Inc. (TCI). It previously distributed Nickelodeon under a similar agreement but has since ceased to carry such programming (Mid-America Ex. 6, pp. 2-14). It was and is Hudson's understanding that TCI was authorized by the program suppliers to authorize its own affiliates to distribute this programming. Crest Communications, Inc., a cable television company in which Hudson previously held an interest, had used this method of acquiring its programming for a number of years without complaint or objection from the program suppliers. TCI's Executive Vice President has specifically advised Hudson that Crest has the right to obtain HBO and ESPN pursuant to TCI's master agreements with these suppliers. In this connection, the accounting by TCI to HBO for use of its program services included monies paid by Crest and specifically identified Crest as an affiliate transmitting HBO programming. HBO is, thus, aware of the service provided by TCI to Crest (Tr. 1544). In addition, Crest

[13] None of the program suppliers have intervened in the proceeding (Tr. 529-30).

pays a fee through TCI to the common carriers distributing the signals of WOR, WGN, and WTBS (Mid-America Ex. 6, p. 2, 15; Tr. 1503–04).

22. Hudson relied on his history of prior dealings with TCI (Tr. 1514–15) and also on the experience and reputation of TCI. "They told me sometime earlier, back in '79, that they had a nationwide contract with satellite delivered services, and that they would provide me as an affiliate [with] those services, and have been doing so since some time in mid-year '79." (Tr. 1504). Further, Hudson's reliance on the statement and representatisons of TCI was also based on the fact that "TCI and I have deal [sic] for so long" (Tr. 1510). Since the filing of the lawsuit in October of 1981, Hudson has once again checked with TCI to be sure that Crest is authorized to carry the satellite signals, and he has been advised that it is so authorized (Mid-America Ex. 6, p. 2, 15).

Comparative Issue

Omaha TV 15, Inc.

23. Omaha TV 15, Inc. is a Nebraska corporation with 300,000 shares of common, $1.00 par value stock authorized, of which 20,816 have been issued and 179,184 shares have been subscribed for. As of May 27, 1980, the cut-off date for this proceeding, the officers, directors and shareholders of Omaha TV 15 were as listed below:

Name	*Office*	*Percent Ownership*
Barbara J. Waldron Coffey	Assistant Secretary	1%
William A. Fitzgerald	Treasurer	9%
Bernice Stephens-Dodd	President and General Manager	15%
Golden J. Zenon, Jr.		7%
L. William Seidman	Vice President	9%
Durward B. Varner		8%
Margre H. Durham	Chairman of the Board	9%
Eugene A. Conley	Vice President	9%
Joyce V. Hatton	Vice President	9%
John P. Ford	Secretary	9%
Robin B. Martin	Vice President	9%
Charles S. Feeney		4%
Birge Swift Watkins		2%

On August 16, 1982, Omaha TV 15 filed an amendment which has been accepted, reflecting that Joyce Hatton and L. William Seidman each acquired half of Robin Martin's stock so that their stock ownership increased to 14% each. All of the shareholders of

Omaha TV 15 are also directors of the corporation (Omaha TV 15 Ex. 1).

24. The principals of Omaha TV 15 have the following broadcast interests.[14]

Name of Principal	*Broadcast Interest*
Joyce V. Hatton	President, director, 11.71% stockholder-Recreation Broadcasting of Aspen, Inc., licensee of KSPN (FM), Aspen, Colorado, permittee of an FM translator staton, Glenwood Springs, Colorado and permittee for a low power television station in Aspen.
	13% stockholder-subscriber, Secretary and director of Albany TV 23, Inc., construction permittee of Channel 23, Albany, N.Y.
	4% interest in LRTV Limited Partnership, permittee for Channel 16, Little Rock, Arkansas.[14a]
L. William Seidman	Together with wife, Sarah B. Seidman, own 22.42% and are Directors of Recreation Broadcasting of Aspen, Inc. (see broadcast interests of the corporation, above).
	18% owner and director of WRUN, Inc. (WRUN-AM) and WKGW/FM, Inc. (WKGW-FM), Utica, N. Y.
	22.55% stockholder of Montachusetts Broadcasting, Inc. assignee of licenses of WFGL and WFMP-FM, Fitchburg, Mass.
	19.83% stockholder-subscriber, Chairman and Director of Albany TV 23, Inc., construction permittee of Channel 23, Albany, N.Y. Mr. Seidman has the right to acquire additional stock upon lending the corporation additional funds.

[14] All of the information is taken from Omaha TV 15 Ex. 10 and amendments to application.

[14a] Hatton, Seidman and Martin have respectively, 8%, 18% and 8% ownership in Little Rock TV, Inc., which has a 5% interest as a limited partner in LRTV Limited Partnership.

	.9% interest in LRTV Limited Partnership, permittee for Channel 16, Little Rock, Arkansas, File No. BPCT-800515KE.[14b]
Robin B. Martin	8% shareholder, Vice Chairman (10/81-1/82) and Director of Albany TV 23, Inc., permittee of Channel 23 in Albany, N.Y.
	4% interest in LRTV Limited Partnership permittee for Channel 16 in Little Rock, Arkansas.[14b]
	51% stockholder, President and director of WRUN, Inc. WRUN (AM), Utica, N.Y.
	51% stockholder, President and director of WKGW/FM, Inc., Utica, N.Y.
	51% stockholder, President, Treasurer, Clerk and director of Montachusetts Broadcasting, Inc. (WFGL/AM and WFMP/FM, Fitchburg, Massachussets)
	21% stockholder, Vice President and director of Regional Broadcasters, Inc. (WMGW/AM and WZPR/FM), Meadeville, Pa.
	85% stockholder, President and director of Wolf Broadcasting Service, Inc. (Wolf/AM, Syracuse, N.Y.)

25. Of the thirteen shareholders of Omaha TV 15, only one, Bernice Stephens-Dodd, a 15% stockholder, is proposed to be integrated full-time into the operation of the station (Omaha TV 15 Ex. 2, p. 4). No other shareholder of Omaha TV 15 has proposed to be involved in the station's operations for a number of hours sufficient to warrant credit for integration. Barbara J. Waldron-Coffey, a resident of Omaha, Nebraska who is Black proposes to work one hour per week at the station in general administrative supervision. Eugena A. Conley is a resident of Omaha and proposes to devote one hour to the station. Margre H. Durham was born in and is a resident of Omaha, and proposes to devote an average of ten hours weekly in general and administrative supervision of the station. William A. Fitzgerald was born in

[14b] Hatton, Seidman and Martin have, respectively, 8%, 18% and 8% ownership in Little Rock TV, Inc., which has a 5% interest as a limited partner in LRTV Limited Partnership.

and is a resident of Omaha. He proposes to devote "one to five hours" per week to the station's financial affairs. John P. Ford is a resident of Omaha. He also does not explicitly propose to spend any time at the station, but proposes to devote "one to five hours" per week to the legal and administrative affairs of the station. Durward B. Varner, who is not a resident of Omaha, proposes to devote ten hours per week to the station's programming. Golden J. Zenon, Jr., a resident of Omaha, who is Black, proposes to spend approximately one hour per week in general and administrative supervision of the station (Omaha TV 15 Exs. 3-9; Tr. 112-136).[14c]

26. Dr. Dodd was born in Phenix City, Alabama on March 17, 1943. Her current residence is Omaha, Nebraska, where she has lived since August 1966. Dr. Dodd received her preparatory school education at Mt. Olive High School, Fort Mitchell, Alabama from which she graduated as the valedictorian majoring in Elementary Education and minoring in Social Studies. She attended graduate school at Atlanta University, Atlanta, Georgia and the University of Nebraska at Omaha, where she received an M.A. in School Administration in December 1973 (Omaha TV 15 Ex. 2).

27. Dr. Dodd taught in elementary school in Sylacauga, Alabama for two and one-half years. Thereafter, the Burroughs Corporation recruited Dr. Dodd to participate in its experimental education program. Dr. Dodd subsequently became involved with the Omaha Opportunities Industrialization Center (OIC), a limited basic education program operating in the heart of Omaha's predominantly black district. Dr. Dodd spent more than a year volunteering all her spare time to help the training program become established. In 1967 she was asked to join the OIC staff as an employee in the position of basic education supervisor. In that position she supervised the faculty of from ten to twenty teachers and teacher aides, both vocational and academic educators. During this period she was also active in helping to acquire training equipment from local businesses and industries to be utilized in training (Omaha TV 15 Ex. 2). In 1969, Dr. Dodd was promoted to director of operations which greatly increased her areas of responsibility, involving her in personnel acquisition and training and grant writing. In 1979, Dr. Dodd was promoted to executive director (Omaha TV 15 Ex. 2).

28. During this period, Dr. Dodd continued to pursue her

[14c] Waldron-Coffey, Conley, Durham, Fitzgerald, Ford and Zenon have also participated in Omaha civic activities (Omaha TV 15 Exs. 3-7, 9).

educational goals. She obtained a Doctorate in Education Administration in December 1978 from the University of Nebraska at Lincoln. She also had extensive management training through the OIC National Institute, the Northwestern Bell Telephone Company, and the Omaha Junior Chamber of Commerce, both in Omaha and at other locations, including Philadelphia, Pennsylvania, Crotonville, New York, and San Francisco, California. (Omaha TV 15, Ex. 2). OIC has grown significantly during Dr. Dodd's tenure as executive director. The staff has more than quadrupled to 32 employees, including three salesmen and the organization has served more than 5,000 persons, offering referral, training, placement, and counseling services (Omaha TV 15 Ex. 2).

29. Dr. Dodd has twice been singled out as Young Woman of the Year; first, by the Omaha Chamber of Commerce, which designated her as one of the ten outstanding young women in Omaha in 1973, and subsequently by the Omaha Womens Political Caucus, which named her Woman of the Year in Business and Professions in 1974 (Omaha TV 15 Ex. 2). Dr. Dodd is a member of many organizations and civic groups. A sampling includes the Omaha Chapter of the NAACP, the Omaha Chamber of Commerce, Mid-American Development Corporation on whose board she sits as Chairman, the OIC National Executive Directors Association, the Nebraska Department of Education's Planning and Evaluation Committee, and the Omaha Mayor's Economic Employment and Advisory Committee (Omaha TV 15 Ex. 2). Dr. Dodd is also a long-time member of the Salem Baptist Church where she has served on the board of trustees and where she sings with the Salem Inspirational Recording Choir (Omaha TV 15 Ex. 2). Dr. Dodd is a black female. She is married to Dr. William Dodd. They have a son, Charod Dante Dodd (Omaha TV 15 Ex. 2).

30. In the event of a grant of a construction permit to Omaha TV 15, Inc., Dr. Dodd will devote full time as President and General Manager of the station and relinquish her position with OIC (Omaha TV 15 Ex. 2; Tr. 242). She intends to run the day-to-day affairs of the station and supervise and direct all aspects of station operation (Omaha TV 15 Ex. 2; Tr. 244, 302). Dr. Dodd has no prior broadcast experience (Tr. 236).

Channel 15/Omaha

31. Channel 15/Omaha is a Texas partnership, and is the successor entity for Sun Broadcasting Company.[15] John S. Tyler is the managing partner and holds a 51% interest in Channel 15/Omaha. Hixon Venture Company (HVC) and Fifty-Third Street Ventures, Inc. (Fifty-Third Street), each holds a 24.5% interest in the applicant.

32. Channel 15/Omaha has no media interests other than its application in this proceeding.[16] At the "B" cut-off date, however, Sun Broadcasting Company was the licensee of Stations KATT-AM/FM, Oklahoma City, Oklahoma.[17]

33. John S. Tyler, HVC and Fifty-Third Street are stockholders of Tyler & Associates, a Texas corporation. Tyler & Associates has a 40% ownership interest in the Satellite Radio Network and a 10% ownership interest in the Satellite Music Network.[18] The Satellite Radio Network provides radio programming via satellite distribution to cable systems and 104 radio stations throughout the United States.[19] The network provides programming to its affiliates 24 hours a day from studios in Charlotte, North Carolina. Its programming consists of bible instructions, religious news, religious music and programming. The Satellite Music Network provides audio programming via satellite distribution to radio stations throughout the United States. Its programming consists primarily of music in various formats (Channel 15/Omaha Ex. 1A). It also provides news once an hour which the licensee-affiliates are free to broadcast if they desire and that news contains intervals which the affiliates must fill with their own programming (Tr. 1135-36). The network does not gather this news itself, has no news force and relies solely on associated press

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[15] By Order (FCC 82M-0843) released March 16, 1982, the Presiding Judge granted a Petition filed on November 6, 1981 by Katz for Leave to Amend to the extent that it reflected that Sun Broadcasting Company had been replaced as an applicant in this proceeding by Channel 15/Omaha.

[16] Information concerning the other media interests of Channel 15/Omaha is taken from Channel 15/Omaha Ex. 1A unless otherwise noted. Exhibit 1A supersedes Channel 15/Omaha Ex. 1 (Tr. 1042).

[17] On March 29, 1982, the Commission granted an application for authority to transfer all of the common stock in Sun Broadcasting Company to Surrey Broadcasting Company (File Nos. BTC-82021FG and BTC-820210F) (Channel 15/Omaha Ex. 1A).

[18] Although the following descriptions of the Satellite Radio Network and Satellite Music Network are set forth *below*, it is concluded ultimately that these interests are not cognizable as media interests for the purposes of diversification criterion of the comparative issue.

[19] Official notice taken of letter to Presiding Judge from counsel for Channel 15/Omaha dated November 11, 1982.

wire service information (Tr. 1182-83). Neither network controls the programming of its affiliates (Tr. 1132, 1138), and both may be characterized as delivery services for programming which may be used at the option of the affiliate (Tr. 1134, 1138). The Satellite Radio Network is completely passive in that it distributes religious programming exactly as it is furnished to it by ministers, and affiliates tape and replay this material whenever they choose (Tr. 1136-37). There is no requirement that affiliates of the Satellite Radio Network carry any percentage of the network programs (Tr. 1134-1135). There is no block of time on either network during which the network has the right to put on a program without any screening by the affiliate (Tr. 1138).

34. HVC is a privately-owned personal holding company engaged in venture capital investing. It is located in San Antonio, Texas, with a branch office in Dallas. It is owned by over 50 stockholders, many of whom are members of the Hixon family. Other stockholders include several trusts for family members and estates. HVC has investments in approximately 20 companies, most of which are not publicly traded. The following officers, directors and/or one percent or greater stockholders of HVC are officers, directors and/or one percent or greater stockholders in communications-related business:[20]

(a) Joseph Morris Hixon, III — a Director and 5.04% stockholder of HVC, is an Officer and Director of Crown Broadcasting Corp., a 49% stockholder of the licensee of Station WAWS(TV), Jacksonville, Florida.

(b) Daniel G. Webster, III — an Officer of HVC, is the Secretary of Sigmore Corporation, whose wholly-owned subsidiaries include: Turner Broadcasting Corporation, licensee of Stations KBUC-AM/FM, San Antonio, Texas; Belton Broadcasters, Inc., licensee of Stations KTON-AM/FM, Belton, Texas; Big C Broadcasting Corporation, licensee of Station KRYS(AM), Corpus Christi, Texas; and Metro Broadcasting Corporation, licensee of Station KXOL(AM), Fort Worth, Texas. Mr. Webster is also secretary of each of those subsidiaries.

(c) Brian Simpson, Jr. — a Director and 1.08% stockholder of HVC, has a 4.4% interest in Bold City Broadcasting, Inc., licensee of Station WCRJ-FM, Jacksonville, Florida.

(d) Irene Hixon Whitney — a 9.802% stockholder of HVC, is married to Wheelock Whitney, an investor and director of a company which publishes newspapers distributed in suburban communities in the Minneapolis-St. Paul, Minnesota area.

(e) Security Pacific National Bank — which holds a 28.835% interest in HVC

[20] Only attributable interests are listed in the following findings.

in a fiduciary capacity, through its trust department holds over 5% of the stock of a privately-held newspaper with no power to vote that stock. The activities of the newspaper company are confined exclusively to California. The media-related interests of the officers and directors of Security Pacific and of its holding company, Security Pacific Corporation, are as follows:[21]

(i) James G. Boswell, II — a Director of Security Pacific Corporation and Security Pacific National Bank, is a director of the General Electric Company. General Electric Company owns General Electric Broadcasting Co. which, in turn, is the licensee, or the parent of the licensee, of the following stations: KFOG(FM), San Francisco, California; KOA-AM-TV and KOAQ(FM), Denver, Colorado; WJIB(FM), Boston, Massachusetts; WGY(AM), WGFM(FM) and WRGB(TV), Schenectady, New York; WSIX-AM-FM and WNGE(TV), Nashville, Tennessee.

(ii) H. Russell Smith — a Director of Security Pacific Corporation and Security Pacific National Bank, is also a Director of Community Television of Southern California, licensee of Station KCET(TV), Los Angeles, California.

(iii) Camilia Chandler Frost — a Director of Security Pacific Corporation and Security Pacific National Bank, is an Officer and Director of Chandis Securities Company, Los Angeles, California, which owns 4,840,716 shares, or approximately 14% of the common stock of Times Mirror.[22] Mrs. Frost individually owns 63,236 shares of common stock of Times Mirror (less than 1%), and she is an income beneficiary of one trust which holds 942,900 shares of Times Mirror common stock. Times Mirror is the parent of the licensees of the following television broadcast stations: KTBC-TV, Austin, Texas; KDFW-TV, Dallas, Texas; WVTM-TV, Birmingham, Alabama; KTVI, St. Louis, Missouri; WETM-TV, Elmira, New Elmira, New York; WSTM-TV, Syracuse, New York; and WHTM-TV, Harrisburg, Pennsylvania. Times Mirror publishes a number of newspapers and operates cable television systems, none of which operate in the State of Nebraska.

(iv) Donald E. Guinn — a Director of Security Pacific Corporation and Security Pacific National Bank, is also Chairman of the Board of Pacific Telephone and Telegraph Company.

(v) James H. Zumberge — a Director of Security Pacific Corporation and Security Pacific National Bank, is also president of the University of Southern California. USC is the licensee of non-commercial educational FM Station KUSC, Los Angeles, California.

(vi) Carl E. Hartnack — a Director of Security Pacific Corporation and Security Pacific National Bank, is also Chairman of the Board of

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[21] Security Pacific also holds a number of convertible debentures in various broadcast stations, none of which are in Nebraska.

[22] Times Mirror has authorized an outstanding 34,154,000 shares of common stock. *Standard & Poor's Stock Directory*, November, 1982. Official Notice Taken.

Trustees of the University of Southern California, licensee of non-commercial education FM Station KUSC, Los Angeles, California.

35. Fifty-Third Street is a private capital investment company composed of 44 shareholders. It was organized and chartered solely to operate under the Small Business Investment Act of 1958, as amended, to provide equity capital and long-term loans to small businesses and is subject to the provisions of the Act and to the regulations issued by the Small Business Administration. No officer, director or stockholder of Fifty-Third Street holds attributable interests in communications media.

36. In the event of a grant to Channel 15/Omaha, Tyler proposes to devote 30 hours per week to the affairs of the station in his capacity as managing partner of the proposed licensee (Channel 15/Omaha Ex. 2, p. 4). Tyler testified that while he would plan to spend three days a week in Omaha, he does not intend to move his home there but will remain in Dallas, Texas where he resides and where the administrative and legal offices of the Music Network are located (Tr. 1181, 1183-84, 1186). Tyler plans to fly to Omaha (Tr. 1189). Tyler envisions his functions as chief executive officer for the proposed TV station as ensuring that public service commitments are lived up to, that EEO regulations are complied with, that programming is on target, and that community needs are ascertained (Tr. 1190). Tyler does not propose to have any day-to-day responsibilities. He plans to hire people for all major line positions, including General Manager who will be in charge of the day-to-day operation of the station, Sales Manager, Program Director and Chief Engineer (Tr. 1189, 1192-93, 1207).

37. Tyler is the founder and managing partner of Satellite Radio Network and the founder and Chairman of the Management Committee of Satellite Music Network (Channel 15/Omaha Ex. 2, p. 1). Tyler spent a great amount of time on these network projects, but has phased himself out of active participation of these endeavors by hiring additional management and administrative personnel (Tr. 1184-86). As a result, Tyler expects to spend about 20 hours a week on both networks (Tr. 1185-87). Tyler has no further involvement with Sun Broadcasting Company because his interests in that business have been sold and he is completely out of that endeavor (Tr. 1188). Tyler has no other businesses or activities that occupy substantial periods of his time (Tr. 1189).

38. Tyler has had extensive experience with AM, FM and television broadcast stations.[23] In addition, he is a past director of the Texas Community Antenna Association and a member of the Broadcast Pioneers. From 1951, when Tyler was 22 years of age, until 1955, he was employed as a salesman by Station KGMC-TV (now KTAL-TV) in the Shreveport-Texarkana market. While at the station, Tyler also participated in studio construction, set design, commercial copyrighting, directing, and news-gathering and writing. He moved to Fort Worth in late 1955 where he was employed as a salesman for the new independent TV station KFJZ-TV serving both Dallas and Fort Worth. He remained there until 1957 when he was promoted to Dallas sales manager and that city became his residence for the next few years.

39. After one year as radio-TV director for Bloom Advertising Agency in Dallas, Tyler returned to work for Texas State Network (owners of KFJZ-TV), this time as general manager of KFDA-TV in Amarillo, Texas. He was employed in this capacity at KFDA-TV from 1959 to 1964 when he resigned to enter business for himself. His new enterprises involved acquiring franchises, and constructing and operating cable television systems. During the next three years, Tyler acquired cable television franchises in Gainesville, Texas and Jonesboro, Arkansas. Both of these systems were built in 1966 and became operational in 1967. Tyler sold these systems in 1971. In early 1968, Tyler returned to Amarillo where he formed a partnership to purchase the ABC Television affiliate, KVII-TV. He was managing partner until 1971 when he resigned to become general manager of the ABC Television affiliate in Atlanta, Georgia, WQXI-TV (now WXIA-TV). After six months at WQXI-TV, Tyler was made President, Chief Executive Officer and Director of the parent company, Pacific and Southern Broadcasting Company. As President of this company, Tyler was responsible for the overall management of WQXI-AM/FM/TV, Atlanta, Georgia; WWDJ(AM), Hackensack, New Jersey; WSAI-AM/FM, Cincinnati, Ohio; KIMN(AM), Denver, Colorado; and KKDJ(FM), Los Angeles, California. During this time Tyler entered into a partnership which purchased KFWD-FM (now KTXQ-FM), Fort Worth, Texas. He was managing partner of the licensee of this station.

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[23] Unless otherwise noted, the material related to Tyler's broadcast experience is taken from Channel 15/Omaha Ex. 2, p. 2-4.

40. In September of 1974, Pacific and Southern Broadcasting Company was merged into Combined Communications Corporation. Tyler resigned and returned to Dallas to work full-time as the manager of KFWD-FM, and he continued in that position until the station was sold in 1976. In 1977, Tyler formed Sun Broadcasting Company for the purpose of purchasing KATT-AM/FM in Oklahoma City, Oklahoma. This purchase was approved and Sun Broadcasting Company began operating KATT-AM/FM in early 1978.

41. At the time that Tyler was Managing Partner of KVII-TV, the station was granted a short-term renewal following an investigation of its promotional practices. Tyler was cross-examined extensively regarding these matters. He testified that the station had mailed out a series of questionnaires or surveys during that period concerning the regular season premiere of new programming, as was its general practice, but that one of three sets of such surveys was mailed too close to an audience survey (Tr. 1155). The station also used billboards to advertise new fall programming, which Tyler testified was a normal part of promotions for new programming schedules (Tr. 1157-58). As Tyler characterized it, "in the television business you promote every fall. If you've got a new season of programming, it's like introducing a new automobile and I'm sure that I've promoted every fall." (Tr. 1157). Finally, the station also used a visual promotion advertisement which stated that the station was the nation's number one ABC station in prime time (Tr. 1158). The advertisement had the appropriate disclaimer statement in the lower left-hand corner and that disclaimer statement was legible on the television monitor at the station (Tr. 1159). An identical graphic visual was used in newspapers and billboards and contained the same disclaimer (*Id.*). When FCC personnel viewed the broadcast advertisement on a motel television set, they could not see the disclaimer. When the matter was brought to Tyler's attention, he immediately pulled the advertisement off the air (Tr. 1159-60). A complaint concerning a contest run by KKDJ-FM, Los Angeles, California was filed with the Commission while Tyler was President of the parent company of the licensee of that station. Tyler was not personally involved in the matter which gave rise to the complaint. The station had a "net of protections" designed to insure that such violations did not occur, and the mishap that allowed the contest violation was immediately corrected when it came to the attention of the station (Tr.

1165-67). The record does not show that any action was taken by the Commission with respect to the complaint.

Mid-America Broadcasting, Inc.

42. Mid-America is a Nebraska corporation with one class of stock, all of which is voting stock (Mid-America Ex. 1). The corporation is 83% owned by Larry D. Hudson, (Tr. 1280), who is its President and one of its three directors.[24] Larry Thompson, who owns 6% of the corporation's voting stock, is First Vice-President and a Director. Dean Coe owns 6% of the corporation's stock and is the Second Vice-President and a Director (Mid-America Ex. 1).

43. Messrs. Hudson, Thompson and Coe each have ownership interests in Mid-America Broadcasting of Topeka, Inc., the permittee for a new television station to serve Topeka, Kansas. Hudson is a 21% stockholder, Director and President of the permittee.[25] Thompson is a 17.5% stockholder, Director and Secretary-Treasurer; and Coe is a 17.5% stockholder, Director and Vice President of the permittee. The site for the Topeka television station and that proposed by Mid-America for Omaha are approximately 150 miles apart (Mid-America Ex. 4A).

44. Hudson is the President, Director, Chairman of the Board and 60% stockholder of Thayer Companies of Kansas. Hudson proposes to acquire a 100% interest in that company. Thayer Companies of Kansas in turn owns 100% of the stock of Thayer Communications, which owns 100% of the stock of Crest Antenna Systems, Inc. (Crest Antenna) (Tr. 1008-10). Crest Antenna owns and operates Master Antenna Television Systems providing cable television service in the metropolitan areas of Wichita, Kansas; Kansas City, Kansas; and St. Louis, Missouri (Tr. 944-46), and Crest Antenna has filed cable television registration statements

[24] Mid-America originally represented that Larry D. Hudson owned an 88% interest in the applicant. Because of apparent mathematical errors, and to avoid untimely comparative upgrading of the application, Hudson's interests were limited to 83% for comparative purposes. *See* Order (FCC 82M-2277) released July 26, 1982. Between them, Messrs. Hudson, Thompson and Coe hold 100% of the stock of Mid-America.

[25] By *Order* released June 14, 1983 (FCC 83M-1934), the Presiding Judge accepted Mid-America's amendment reporting the filing by WINT-TV, Inc. of an assignment application to acquire Channel 20, Crossville, Tennessee. Hudson has a 90% interest in the assignee.

for the systems (Tr. 998).

45. Hudson is a 50% partner in a company which proposes to provide cable television service to several communities in the St. Louis, Missouri vicinity (Mid-America Ex. 4A). Hudson is an Officer, Director and 60% owner of CableVision of Jefferson County, which owns 50% of a company authorized to engage in providing cable service in Jefferson County, Missouri (Tr. 947–48). In addition, Hudson owns 100% Cable TV Construction, Ltd., and is the President, Chief Executive Officer and only employee of that cable construction company. The Company will be the general contractor in constructing the Jefferson County cable system (Tr. 956–58).

46. As of the "B" cut-off date in this proceeding, Hudson was an Officer, Director and 66 2/3% stockholder of Crest Communications, Inc., which operates cable television systems in the following communities: Newton, Halstead, Valley Center, Sedgwick, Hesston, Peabody, El Dorado, Augusta, Andover, Derby, Haysville, Park City, Mulvane, Bel Aire, Rosehill, Goddard, Maize, Kechi, and other unincorporated areas in Sedgwick County, Kansas; and cable systems in the State of Missouri, including those operating in Cape Girardeau and Jackson, Missouri (Mid-America Ex. 4A; Tr. 938–49).

47. Jerry Estes, who was a Vice President of Mid-America, is a 10% and 30% partner, respectively, in cable television systems serving Jackson and Cape Girardeau, Missouri (Mid-America Ex. 1 & 4A).

48. If Mid-America is awarded a construction permit for the Omaha television station, Larry D. Hudson will work at the station on a full-time basis, serving as the station's general manager. Hudson was born in Kansas and has resided in either Neosha County or Allan County, Kansas, to the present time (Tr. 994–95, 1012–13). Hudson proposes to move to Omaha, Nebraska and operate Mid-America's station as its general manager, without being paid until the station becomes profitable (Tr. 994–95, 1019). Hudson has had no previous experience in broadcasting (Tr. 995, 997).

49. As noted above, Hudson is the President, sole owner and employee of Cable TV Construction, Ltd., which proposes to construct a cable television system in Jefferson County, Missouri. Hudson currently spends approximately sixty hours a week in connection with the Jefferson County proposal (Tr. 1011, 1027–28). He also spends at least one day every other week with Crest Antenna (Tr. 1011). Hudson does not intend to personally

manage the Jefferson County cable system (Tr. 1030). He will hire Telecom Engineering, a St. Louis based company to manage the Jefferson County system (Tr. 1011, 1030). Hudson has not had management responsibilities with a cable system since mid-1979 (Tr. 1029). Hudson has no current plans for applying for other cable franchises (Tr. 1028).

50. Mid-America proposes to have an auxiliary power supply source which will permit uninterrupted program service in the event of a power failure (Mid-America Ex. 3).

Koplar Communications, Inc.

51. Koplar is a Missouri corporation and is a wholly-owned subsidiary of Koplar Enterprises, Inc., also a Missouri corporation. The officers and directors of both companies are as shown below:

Name	*Office Held*	*Director*
Harold Koplar	Chairman of the Board	Yes
Edward Koplar	President	Yes
Harold Protter	Vice President	No
Joseph McCabe	Vice President & Secretary	Yes
Hulas Canodia	Vice President/Treasurer	No
Susan K. Brown	Vice President	Yes
Larry Marcus	Ass't Secretary/Vice Pres.	No
Dempster Holland	Ass't Secretary	Yes

(Koplar Amendment dated July 27, 1982; accepted by Order (FCC 82M-2509), released August 18, 1982). The stock of Koplar Enterprises, Inc. is held by three individuals: Harold Koplar (48.75%), Lilliam Koplar Shenker (25.6%) and Betty Koplar Bennett (25.6%). Koplar Enterprises, Inc. is currently in the process of transferring Ms. Bennett's interest to Koplar and Shenker. Upon ultimate redemption of all of Ms. Bennett's stock, those percentage interests will increase to 65.5% and 34.5% respectively. *Id.*

52. Koplar is the licensee of KPLR-TV, St. Louis, Missouri. Its wholly-owned subsidiary, Koplar Communications of California, Inc., a California corporation, is the licensee of KRPK-TV, Sacramento, California (Koplar Ex. 1).

53. Koplar does not propose for any of its stockholders, or stockholders of its parent corporation to be integrated in the day-to-day operations of the proposed station in Omaha, Nebraska.

Family Television Inc.

54. Family Television, Inc. is a Nebraska corporation which was formed in July 1978. Its corporate charter was amended April, 1979, for the express purpose of making application for a construction permit, and constructing, owning and operating a new UHF television broadcast station on Channel 15 at Omaha, Nebrasks (Family Ex. 1).

55. Family is authorized to issue 100,000 shares of $1.00 par value, voting common stock. To date, 26,600 shares of the corporation's stock has been issued to its principals. In addition, 73,400 shares of the corporation's common stock have been subscribed to purchase by Family's principals. The following persons have each been issued and have each subscribed to Family's common stock in the following amounts:

	Number of Shares		*% of*
Name	*Held*	*Subscribed*	*Ownership*
Alvin M. Goodwin	2,500	6,500	9.00
Myron H. Milder	2,500	6,000	8.50
Willard A. Richardson	2,500	6,000	8.50
Donald H. Erickson	2,500	6,000	8.50
John H. Gayer	10,000	22,500	32.50
M. Edward Baccari	2,500	6,000	8.50
Ralph G. Rogers	1,250	3,000	4.25
Clay M. Rogers	1,250	3,000	4.25
Mattie L. Humphrey	1,000	9,000	10.00[26]
Eugene Crawford	600	5,400	6.00
TOTAL	26,600	73,400	100.00

(Family Ex. 1)

[26] Ms. Humprey has paid $1000 for 1000 shares of stock (Tr. 434) and has entered into a legally binding agreement to purchase the remaining 9,000 shares of Family stock (Omaha TV 15 Exs. 11, 12; Tr. 706-708, 709). Ms. Humphrey will pay the $9,000 for the remaining shares at the rate of $3,000 a year for three years out of her salary (Tr. 436). In this connection, Ms. Humphrey, because of personal and financial reasons, has been exempted from contributing to the costs and expenses incurred in Family's prosecution of its application (Tr. 448-50, 712). An agreement executed February 24, 1982 whereby certain Family stockholders agreed to loan Family funds, provides that the loaning stockholders can convert their loan to stock if the loans are not paid back (Koplar Ex. 3, p. 2; Tr. 757-59). Clay Rogers, who prepared the agreement, suggested the conversion feature in an effort to meet Family's need for cash to be fair to all stockholders (Tr. 728-29). Rogers stated that the stockholders intend that the loan be repaid and that he did not know of any circumstances under which the loaning stockholders would seek conversion, rather than repayment. According to Rogers, a Nebraska attorney testifying as an expert on Nebraska law (Tr. 706-08), the consenting stockholders would have a cause

56. The officers and directors of Family are as follows:

Name	*Office Held*	*Director*
Clay M. Rogers	President	Yes
Mattie L. Humphrey	Executive Vice President	Yes
Alvin M. Goodwin	Vice President	Yes
Donald H. Erickson	Secretary	Yes
M. Edward Baccari	Treasurer	Yes
Myron H. Milder	—	Yes
Ralph G. Rogers	—	Yes
Willard A. Richardson	—	Yes
Eugene Crawford	—	Yes

57. No principal of Family has any ownership in any broadcast, cable television, newspaper or other medium of mass communications (Family Ex. 1).

58. Milder is Chairman of the Board of Directors. The Board o Directors has an Executive Committee, formed pursuant to t corporation's Bylaws, which consists of Messrs. Clay M. R M. Edward Baccari, Alvin M. Goodwin, Myron H. Milde Donald H. Erickson (Family Ex. 1). Ms. Humphrey ha treated as a member of the Executive Committee ever sin became a stockholder of Family and will be on the Ex Committee if Family receives the permit and Ms. Hump moves to Omaha (Tr. 628, 698).

59. Mattie L. Humphrey, a 10% owner, who is Black, will the full-time general manager of the station. Messrs. Roge Goodwin, who is Black, Baccari and Milder, representing 30.2 ownership, each propose to devote a minimum of 20 hours to management and day-to-day operations of the station in vari capacities, as discussed below (Family Ex. 2, 3, 4, 5 and 6).

60. Ms. Humphrey was born in Philadelphia on July 25, 1 She attended public schools in Philadelphia and graduated the Philadelphia High School for Girls in the upper quarter o class. She received a Bachelor of Science degree in Nursing fr the Catholic University of America and a Masters Degree i Administration from the University of Michigan School of Bu ness Administration. She is also a Registered Nurse havi received a certificate from the Bellevue Hospital School f Nursing. She has completed an advanced Environmental Stu program as a LOEB Fellow at Harvard University's Gradu School of Design. In addition, she was an instructor at the 1 Urban Communications Seminar sponsored by the Annenb

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of action, if Family, notwithstanding its ability to do so, elected not to re the loans to the detriment of the consenting stockholders (Tr. 715, 717).

School of Communications of the University of Pennsylvania (Family Ex. 3). Since 1948, Ms. Humphrey has worked as a professional nurse, both privately and at hospitals. She has held the positions of Head Nurse, Supervisor, Director of Nursing and administrator (Family Ex. 3). As Director of Nursing she has supervised as many as 50 persons. As a hospital administrator she has supervised a variety of departments and employees (Tr. 542).

61. Ms. Humphrey was a founder and director of the Germantown Neighborhood Youth Corps, a consultant to the Health and Welfare Council of Philadelphia, a Health Planner of the North Central Philadelphia Areawide Council and at the Springarden Commmunity Service Center (Hahneman Medical School). She has also authored a Proposal for a Baccalaureate for Delaware State College; served as a consultant to Wayne State University and the Department of Community Affairs of the State of New Jersey; and been a Guest Lecturer at the University of Pennsylvania, University of Wisconsin and Temple University. In these professional activities she has developed and refined the management skills which she will utilize as General Manager of Family Television's proposed station (Family Ex. 3).

62. Since 1968, Ms. Humphrey has broadcast her own radio show on station WDAS-AM and FM, Philadelphia. In addition, in 1976 she was hired by these stations as Community Service Broadcasting Liaison. In this position she is responsible for the production of 13 hours per week of public affairs programming, and works in a management role with security, broadcast personalities and engineering personnel at the stations in the production and broadcast of this programming (Family Ex. 3). Ms. Humphrey has also been involved over the past 15 years in television production for private television and television stations WPVI-TV and WCAU-TV, both in Philadelphia. During this time she has helped produce or been guest moderator on an ad hoc basis for programs broadcast over these facilities. In the early 1960's Ms. Humphrey helped develop and produce a weekly one hour documentary (Tr. 580). Frequently, she appeared on-the-air either as a moderator or member of a discussion group (Tr. 580-81). Ms. Humphrey also produced a series of programs that had to do with health and aging (Tr. 585).

63. Ms. Humphrey currently resides in Philadelphia. If the Commission grants Family's application, she will move to Omaha, Nebraska and assume full-time responsibilities as General Manager. She will be responsible for the recruitment and management

of the staff, the preparation and supervision of plans and programming, sales, and the general administration of the station's operations. In addition, she will serve as a Director and member of the Executive Committee of Family and will participate in the formulation of general policy decisions which will govern the operation of the station (Family Ex. 1; Tr. 698).

64. Clay Rogers has been a resident of Omaha, Nebraska since 1961. Rogers received a Bachelor of Arts degree in 1971 from the University of Nebraska at Lincoln in 1971 and a law degree from Creighton University in Omaha in 1974 (Family Ex. 2). While in law school Rogers was employed as a full-time salesman for radio stations KOIL and KEFM-FM in Omaha. In May, 1974 he became the sales manager of KEFM-FM until February 1977 (Family Ex. 2). As sales manager from KEFM, Rogers administered all duties for all persons working for the station. At that time the station had approximately 15 employees whom he supervised. Roger's other duties at KEFM-FM included overseeing all aspects of the business operation of KEFM including administration, programming, and sales (Family Ex. 2).

65. In February, 1977, Rogers joined the law firm of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune in Omaha and took up the active practice of law. He has been engaged in the practice of law with this firm and its successors from 1977 until the present (Family Ex. 2). Rogers testified that one reason he joined this law firm is because the firm permits its lawyers to have active, outside business interests and several attorneys at the firm have such active outside interests (Tr. 321, 347).

66. Rogers proposes to devote at least 20 hours of his time per week to the station as Director of Programming. In that position, he will oversee and be responsible for all station programming and talent operations. This will include procurement of programming material on a national and regional basis for broadcast by the station and production of local programming (Family Ex. 2). Rogers will continue to practice law, but will reduce his work schedule in order to meet his time commitment to Family. Rogers explained that he would spend all day Friday and Tuesday, Wednesday and Thursday afternoons at the station to fulfill his commitment (Tr. 338). Rogers has informed the managing board of his law firm of his plans to cut back his legal practice to spend time at the station (Tr. 321). Rogers testified that he could do this because much of the legal work he does can be delegated to others in his office and that he could still generate business for the firm and receive credit for it without being in the office fifty to sixty

hours a week (Tr. 321-22).

67. Alvin M. Goodwin is a life long resident of Omaha. He attended grade school and high school in Omaha and received a degree in math and economics from the University of Nebraska at Omaha. Goodwin has also accumulated 21 credit hours toward a Masters Degree in Business Administration (Family Ex. 4). After graduation from college in 1967, Goodwin accepted a position as a Loan Servicing Assistant with the U.S. Small Business Administration (SBA) in Omaha. He was promoted to Loan Officer and received a further promotion to Community Industrial Economics Planner. His duties at SBA involved the processing and credit decisions on SBA business loan applications, along with providing management and technical assistance to small business concerns in the State of Nebraska. Much of his time at SBA was spent in providing assistance to minority business persons in Nebraska (Family Ex. 4).

68. In January of 1970, Goodwin resigned from SBA to accept employment in the Mayor's office as a Federal Liaison Officer for the City of Omaha. He acted as a grantsman for the city and coordinated all federal grant-in-aid received by the city. In 1971, he was promoted to Administrative Assistant to the Mayor and held that position until June of 1972 (Family Ex. 4). In June of 1972, Goodwin joined the staff of United Methodist Community Center, in order to focus his skills and efforts directly toward assisting minority group members in Omaha. The Center had a grant from the U.S. Department of Commerce to provide loan packaging, procurement and technical assistance to minority group members in Omaha. This activity was conducted through the Urban Business Development Center (UBDC) which was a newly formed spinoff of the Center. Goodman was a Financial Analyst and Director at UBDC. Through the efforts of UBDC and the Center, a community based credit union, radio stations KOWH AM/FM and Community Bank of Nebraska (a black owned bank), Community Equity Corporation (an SBA licensed MESBIC with $500,000 paid in capital) and the Omaha Economics Development Corporation (OEDC) were formed. In addition, many minority group members received loans and technical assistance through UBDC and the Center (Family Ex. 4).

69. Goodwin is currently a Director of the Community Bank of Nebraska, and the Community Equity Corporation and is the President of OEDC. OEDC was incorporated in 1978. Goodwin has been the President of OEDC since its inception. OEDC is a federally funded not-for-profit corporation involved in community

based economic development. Currently, OEDC is involved in the process of constructing 132 units of low-priced family housing in the Omaha black community at a cost of $5,000,000 (Family Ex. 4).

70. Over the past 15 years, Goodwin has been actively involved as an officer and director in many civic and professional organizations. These civic and professional organizations include Area Agency on Aging, Metropolitan Area Planning Agency, Urban League, NAACP, Kiwanis Chamber of Commerce and Rotary International (Family Ex. 4).

71. Goodwin is proposed as the Director of Community, Minority and Aged Affairs. He plans to spend 20 hours per week in this function. He will be responsible for interfacing with minority group members, older Americans and various organizations serving their interests in the service area. It will be his responsibility to reasonably ensure that the needs and concerns of these particular segments of the proposed Family Television service area are adequately addressed and met in a timely and professional manner. This would include the development, production and implementation of public affairs, instructional, educational and other similar programs designed to benefit and assist minority group members and older Americans (Family Ex. 4). Goodwin testified that with the cutback in federal funds for OEDC, the time he would have to spend at OEDC would be reduced by at least ten hours per week (Tr. 362). Goodwin testified that he would fulfill his commitment to Family of 20 hours per week regardless of what happened at OEDC (Tr. 401). Goodwin does not have an employment contract with OEDC (Tr. 358).

72. Myron Harry Milder is a life long resident of Omaha, having been born there in 1927. He attended public schools in Omaha and received a Bachelors Degree from the University of Omaha in 1948. After college Milder joined the Milder Oil Company, a fuel oil marketing firm founded by his father to service the Omaha area. Milder served in several positions with this company involving credit, advertising, public relations, management. Milder became president in 1971. He is also a director and a stockholder in the company (Family Ex. 6).

73. For a number of years, Milder has been involved in civic work in Omaha and in Nebraska. He has served as Local and State President of the Jaycees, and National Vice President of the U.S. Jaycees. In 1959, he was selected Omaha's Outstanding Young Man. Milder has served as a member of the Omaha YMCA

Board of Management, member of the Board of Directors of the Omaha Chamber of Commerce, Meyers Childrens Therapy Center, Eastern Nebraska Mental Health Association, and Henry Monsky Lodge of B'nai B'rith. He has also served as Post Historian of Omaha American Legion Post No. 1, a member of the Omaha City Planning Commission, Chairman of the Easter Seal Campaign, Board of Governors of the Boys Clubs of Omaha, member of County Central Committee of his political party, and member of a Research Grants Advisory Board of the then U.S. Department of Health, Education and Welfare. Milder is a member of Rotary International, Masons, B'nai B'rith and The American Legion, all located in Omaha (Family Ex. 6).

74. If Family is awarded a construction permit for Channel 15, Milder will devote twenty hours a week to the station as Director of Sales. In this capacity, he will be responsible for establishing sales policies and practices of the station and will supervise the station's Sales Manager and sales staff in local, regional and national sales and promotion (Family Ex. 6). Milder testified that he spends about 25 to 30 hours per week as President of Milder Oil (Tr. 779). Milder Oil's day-to-day operations are run by its Vice President, a 33 year veteran of the company, and Milder's 22 year old son, who is being trained to run the company (Tr. 780). As to his duties Milder testified that he would supervise the national and local sales managers, meet with them and the sales staff, work with them on promotions, and, when necessary, accompany sales people to start an account or to close a deal (Tr. 798). As Sales Manager, Milder would draw on his long association with the Omaha community and his involvement in its civic affairs (Tr. 798).

75. Dr. Edward Baccari was born in Brooklyn, New York and has lived in Omaha, Nebraska since 1961. He received his elementary and high school education in Brooklyn, New York and graduated from New York University in 1961 with a Bachelor of Arts Degree. He then entered Creighton University School of Medicine in Omaha, Nebraska in 1961 and graduated in 1965. He was the intern and resident at the Creighton University Affiliated Hospitals from 1965-70. From 1970-72 he was a resident in plastic surgery at the St. Louis University Hospital, St. Louis, Missouri. He was board certified by the American Board of Surgery and by the American Board of Plastic Surgery. He has also received research grants and fellowships in the medical field, and is also a member of many medical groups. He serves as Assistant Clinical Professor of Surgery at Creighton University

School of Medicine, is affiliated with a number of hospital affiliations in Omaha and with Boys Town Institute for Communication Disorders in Children (Family Ex. 5).

76. He is an officer, director and stockholder in Plastic and Reconstructive Surgery, P.C., a professional corporation engaged in the practice of plastic and reconstructive surgery in Omaha, Nebraska. He has been engaged in the practice of medicine since 1972 in Omaha (Family Ex. 5). At present, Dr. Baccari spends 50 hours a week in his medical practice for two out of three weeks, and in the third week an average of 25 hours a week. He intends to cut his medical practice workload to alternate work weeks of 33 hours and 20 hours (Tr. 816-17). He also spends three hours every two weeks as Director of Communications for the Boys Town Communication Institute (Tr. 807-09).

77. Dr. Baccari proposes to devote a minimum of 20 hours per week to the station as Medical and Financial Advisor to Family if it is awarded the construction permit (Family Ex. 5, p. 2; Tr. 843, 851). He plans to work 10 hours a day on Tuesdays and Thursdays one week and 8 hours a day on Mondays, Wednesdays and Fridays the next week (Tr. 859). Initially he proposes to spend most of his time getting the station off the ground financially, and then he will spend more time in health care affairs (Tr. 822). The station will hire a business manager who will be supervised by Dr. Baccari (Tr. 822-23, 826). In addition, all Dr. Baccari's decisions will be subject to the approval of the board of directors (Tr. 826). Once the station is off the ground, Dr. Baccari's main role will be involvement in health care programming. He may work on particular programs such as those involving frostbite of the elderly and child abuse (Tr. 830). The health care programming for which he would take responsibility would be on for about half-an-hour a week. He would be responsible for deciding on the subjects and contacting the guests, but would not be on the air (Tr. 833-34). He would suggest to Rogers subjects that should be covered in health care programming and would send all programming to Clay Rogers for his approval (Tr. 831-33).

CONCLUSIONS

Qualification Issues

Issue 3 — Levin Issue

78. The issues added in the *Levin* proceeding were resolved in favor of John H. Gayer. Accordingly, it is concluded that the

determinations in that proceeding have no bearing on the basic or comparative qualifications of Family.

Issue 4 — Jackson Cable TV Issue

79. Judge Head's summary decision released January 8, 1978 concluded that Jackson knowingly and willfully violated Section 76.11 (certification requirements) and Section 73.63 (distant signal carriage) of the Cable Television Rules. This decision, which was affirmed by the Review Board, is *res judicata* and is not at issue in this proceeding. The fact that the decision became moot because of the repeal of the distant signal carriage rules does not excuse Jackson's conduct or mitigate the seriousness of the violations. The question to be decided here is Larry Hudson's role in these violations and the effect of such involvement on the basic or comparative qualifications of Mid-America. For the reasons discussed *below*, it is concluded that the findings do not support Mid-America's disqualification or assessment of a comparative demerit.

80. Although the three St. Louis network signals were carried by Jackson from the commencement of its operation in 1975 until the end of 1979, the relevant time period is considerably more circumscribed. The cable system did not have fifty subscribers until sometime in April 1976 and was therefore not bound by the cable rules until that point.[27] In addition, Hudson was voluntarily relieved of his role as managing partner of the system in May 1977. Jones was made manager effective June 1, 1977. Hudson had no further control over the management and direction of the system from that time. Thus, the focus of inquiry must be limited to the April 1976 to May 1977 period.

81. By letter of January 27, 1976, Hudson was advised by his communications counsel that non-certified signals could be carried by a cable system under certain circumstances without prior Commission approval. In reliance upon counsel's advice, Hudson ordered an expensive piece of switching equipment which was programmed in accord with counsel's letter to comply with the distant signal carriage rules. Although the precise dates are not available, the findings establish that the switcher was activated in the spring of 1976 and, despite frequent breakdowns, it was used until it was shut off in the fall of 1976. There is no evidence that

[27] At the time Judge Head released his summary decision, the minimum number of subscribers was raised to 500. The 500 subscriber point was reached in May or June 1976.

Hudson ordered the switching device to be turned off or that he directed carriage of the offending signals. On the contrary, after learning that the switcher had been abandoned, Hudson made repeated efforts to get his partners to agree to activate the switcher and try to make it work. These efforts were all unsuccessful. Thus, following a meeting of the partners in December 1976, Hudson received a letter from one of the local partners stating that the Jackson partners had "unanimously" approved a motion directing Hudson as managing partner not to cut off any channels currently carried by the Jackson system. As noted in the findings, Jones' recollection as to the dates when the switcher was turned on and off differs from that of Hudson. However, Jones' testimony demonstrates a lack of clear recollection of these and other events and cannot be relied on. Hudson's testimony is entirely credible and supported by the record. No credible evidence has been offered refuting his account of the events surrounding Jackson's violation of the cable rules. In this connection, none of the local partners was called as a witness. In addition, the Presiding Judge saw and heard Hudson testify and found him to be a truthful witness.

82. Hudson's actions in seeking the advice of his counsel, his purchase and activation of an expensive switching device, his continued use of the device despite frequent breakdowns, the fact he played no role and was unaware that the switching device had been abandoned, and his repeated attempts to get his partners to agree to activate the switcher after it had been turned off belie any intent on his part to violate the cable rules. Significantly, when Hudson purchased control of the Jackson system in late 1979, he immediately directed that carriage of the St. Louis signals to be terminated. This remedial step at the earliest point at which he was able to take it demonstrates Hudson's basic willingness to comply with the Commission's rules. It is true, as urged by Omaha TV 15, that under the partnership agreement Hudson, as managing partner, had responsibility for running the cable system. Notwithstanding, Hudson was effectively powerless to alter the decision of his partners to discontinue use of the switching device. Under the partnership agreement, Jackson Cable TV, Inc., controlled by Hudson, had only one out of eleven votes on partnership matters and Hudson could be removed as managing partner by a vote of 60% of the partners. Thus, Hudson's only recourse was to accede to his partners' wishes or to terminate his position, which he in fact did several months later.

In addition, Hudson lived in Chanute, Kansas and only visited Jackson approximately three days each month. Hudson's partners, on the other hand, were Jackson residents. As a practical matter, it would have been futile for Hudson to have the switcher turned on in opposition to his partner's wishes since the partners could have it turned off as soon as he left Jackson to return to Chanute. It is clear that responsibility for the unlawful carriage must rest with Jackson's local partners, not Hudson. Issue 4 is resolved in favor of Mid-America.

Issue 5 — Section 605 Issue

83. The findings do not permit a conclusion that Hudson violated, or conspired to violate § 605 of the Communications Act and, therefore, do not support Mid-America's disqualification or assessment of a comparative demerit. Hudson's company, Crest, has been receiving and distributing the non-broadcast signals of HBO, ESPN and CNN. Although Crest has no direct agency contracts with these program suppliers, it is clear that Crest has been paying the program suppliers through TCI for the use of the programs, and the program owners have accepted those payments without complaint. The indirect payment method used by Crest here was also used for a number of years by Crest Communications, Inc., a cable television company in which Judson previously held an interest. There is therefore a strong inference that HBO and the other program suppliers have at least implicitly authorized Crest's use of their programs. It is significant in this regard that none of the program suppliers have intervened in the pending litigation in Kansas regarding the alleged unauthorized use of their programs.

84. Apart from the program suppliers' conduct, there is also the matter of TCI's blanket agreements with the program suppliers. TCI's agreements with Crest suggest that TCI did in fact have the authority to permit its affiliates to receive programming under these blanket agreements. Certainly nothing in the record suggests that TCI did not have such authority. Moreover, TCI's Vice President has repeatedly assured Hudson that Crest's actions are proper under the TCI agreements. On the basis of the limited record available here, there is no basis on which to conclude that Crest was not actually authorized to receive the programs pursuant to TCI's agreements with the program owners. In this connection, even assuming *arguendo* that a technical violation of s 605 has occurred, the circumstances concerning

Crest's reception and distribution of the programs, discussed, *supra*, indicate beyond doubt that Hudson did not intend to violate Section 605 of the Act and no comparative demerit would be warranted. See *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982).

Comparative Issue

85. The comparative issue must be decided in accordance with the *Commission's Policy Statement on Comparative Broadcast Hearings* (Policy Statement), 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communication.

Diversification of Mass Media

86. Neither Family or its principals own any media interests. Channel 15/Omaha argues that ownership interests of relatives of Family principal, John H. Gayer, should be attributed to Gayer for comparative purpose because of the "close business ties" between Gayer and his family members, Channel 15/Omaha's argument rests solely on speculation and conjecture and is rejected. Neither Gayer nor his relatives testified in this proceeding and no evidence has been offered supporting Channel 15/Omaha's assertion concerning the alleged "close business ties." Unlike Family, the remaining applicants are chargeable with media interests. Three of Omaha TV 15's principals hold a number of broadcast interests. Joyce V. Hatton, 9% Omaha TV 15 shareholder, holds a 11.71% interest in Recreation Broadcasting of Aspen, Inc. (Recreation), licensee of an FM station in Aspen, Colorado, permitee of an FM translator station in Glenwood Springs, Colorado and permittee of an Aspen low power television station. Hatton also holds a 13% interest in Albany TV 23, Inc., permittee of Channel 23, Albany, New York. L. William Seidman, 9% Omaha TV 15 shareholder, together with his wife, own a 22.42% interest in Recreation and holds separately a 19.83% interest in Albany TV 23, Inc., 22.55% stock interest in Montachusetts Broadcasting, Inc. (Broadcasting), assignee of licenses of WEGL and WFMP-FM, Fitchburg, Massachusetts, and 18% interest in WRVN, Inc. and WKGW/FM, Inc., licensees of an AM and FM station in Utica, New York. Robin B. Martin, 9% Omaha TV 15 shareholder, holds an 8% interest in Albany TV

23, Inc., 51% interest in WRVN, Inc. and WKGW/FM, Inc., 51% interest in Broadcasting, 21% interest in Regional Broadcasting, Inc., licensee of an AM and FM station in Meadeville, Pennsylvania and 85% interest in Wolf Broadcasting Service, Inc., licensee of an AM station in Syracuse, New York. Seidman, Martin and Hatton, also own, in the aggregate, 2% interest in a limited partnership which is to acquire a 5% interest in the permittee of a Little Rock TV station. Under the settlement agreement, the limited partners were to be investors only and were to have no control over the management of the station (Omaha Ex. 10). Channel 15/Omaha argues that a demerit should be assessed against Omaha TV 15 because Durward Varner, a 7% stockholder, is a director of the Lincoln Telephone and Telegraph Company in Lincoln, Nebraska. Varner has no ownership interest in the telephone company and there is no evidence in the record showing the telephone company serves the Omaha area or provides services of any kind to Omaha broadcast stations. Channel 15/Omaha's argument is, therefore, rejected. *Brindlee Broadcasting Corp.*, 56 FCC 2d 138 (1975), *aff'd. sub nom. Marshall Co. Broadcasters Co., Inc.* v. *FCC*, 571 F.2d 674 (D.C. Cir. 1978), cited by Channel 15/Omaha, is inapposite. Unlike this case, the principal of the applicant there was the principal owner of a telephone company in the community of license and the record contained evidence showing that the telephone company served the community of license and in fact already provided services to competing broadcast stations in that community.

87. For the comparative purposes, the partners of Channel 15/Omaha must be regarded as the owners of Station KATT-AM/FM, Oklahoma City, Oklahoma. Other than this interest, none of those partners hold a direct interest in any other licensed standard FM or television broadcast station. Officers, directors, and shareholders of HVC, which holds a 24.5% interest in Channel 15/Omaha serve as officers, directors and/or hold one percent or greater stockholdings in attributable communications media (see Findings, paragraph 34).[28] Most of the indirect interests are derivative, since they are directorships of licensees, held by directors of a Bank, which holds a minority interest in HVC. The Bank itself has only a fiduciary interest in HVC, which is itself a passive investor in Channel 15/Omaha. The interests

[28] Security Pacific National Bank holds convertible debentures in a number of broadcast licenses. Such debentures are not considered to be voting stock interests and are not attributable interests. See *Evening Star Broadcasting Company*, 67 FCC 2d 318, 323 (1978); *James R. Searer*, 42 RR 2d 73, 76 (1977).

held by HVC officers or shareholders involve insignificant ownership interests and are similarly attenuated. These interests, which are far from the proposed Omaha station, are accorded very little significance under the diversification criterion. See *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd. 1982); *Webster Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1982). Finally, the Satellite Radio Network and the Satellite Music Network, partially owned by Tyler & Associates, are not cognizable as media interests for the purpose of the diversification criterion. Neither network controls the programming of its affiliates. The affiliates retain the absolute right to select programs they will broadcast and to determine when they will broadcast them. The networks merely deliver programming to the licensees, just as a production company or delivery service provides material for the licensee. See *Morris, Pierce & Pierce*, 88 FCC 2d 713 (Rev. Bd. 1981); *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979).

88. Mid-America has no direct interests in other communications media. However, its three principals, Hudson, Thompson and Coe, hold a controlling interest in the permittee of a television station in Topeka, Kansas, approximately 150 miles from Omaha.[29] Hudson is the controlling stockholder of corporations which own and operate Master Antenna Television Systems in Kansas and Missouri. These systems provide cable television service and Hudson's companies have filed cable television registration statements for the systems. For purposes of the diversification criterion, they will be treated as operating cable systems. Hudson is also the 50% partner of companies proposing to provide cable television service to several communities in the St. Louis, Missouri vicinity and owns the controlling interest in a company which owns 50% of a firm authorized to provide cable service in Jefferson County, Missouri. In addition, for comparative purpose, Hudson is also charged with holding controlling interests in cable systems serving approximately another 19 communities in Kansas and Missouri. Also, minority interests in cable systems serving several communities in Missouri are attributable to Jerry Estes, who was a Vice President of Mid-America as of the "B" cut-off date. Interests in cable television systems

[29] Although applications are not recognized as media interests under the diversification criterion, it should be noted that Mid-America recently amended its application to report the filing by WINT-TV, Inc. of an assignment application to acquire Channel 20, Crossville, Tennessee. Hudson has a 90% interest in the assignee.

are clearly germane to the diversification issue. *Loraine Community Broadcasting Co.*, 13 FCC 2d 106 (Rev. Bd. 1968), *recon. denied*, 14 FCC 2d 604, *rev. denied*, 18 FCC 2d 686 (1969), *aff'd sub. nom. Allied Broadcasting, Inc.* v. *FCC*, 435 F. 2d 68 (D.C. Cir. 1970).

89. Koplar is the licensee of KPLR-TV, St. Louis, Missouri. Its wholly owned subsidiary is the licensee of KPRK-TV, Sacramento, California.

90. Family has an indisputable advantage over its competitors since it is the only applicant which does not have any media interests. The extent of Family's advantage varies among the applicants. Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement*, 1 FCC 2d at 394-5; *Greater Wichita*, *supra*, 90 FCC 2d at 1048. None of the other applicants have media interests in Omaha, or the proposed service area. Consequently, an award of a substantial preference over any of Family's competitors is not warranted. With respect to Channel 15/Omaha its ownership of an AM/FM combination a substantial distance from Omaha and its indirect holdings, discussed, *supra*, are of minimal significance. Channel 15/Omaha ranks second among the applicants under the diversification criterion and Family only enjoys a slight diversification preference over Channel 15/Omaha. Although Omaha TV 15's media holdings are far more substantial than Channel 15/Omaha's and include interests in full power and low power television stations, the same service applied for here, they are geographically diffuse. Omaha TV 15 ranks third and Family's preference is slight to moderate. Koplar's holdings are less in number than Omaha TV 15. While Koplar's ownership of a television station is of little significance, its 100% ownership of a television station in the adjoining state of Missouri warrants the award to Family of a moderate preference. Koplar ranks fourth under the diversification criterion. With respect to Mid-America, the proximity of the Topeka TV station controlled by its principals plus the extensive CATV interests in neighboring states also justifies the award to Family of a moderate preference. Since Mid-America's television holding is closer to Omaha than Koplar and in light of Mid-America's CATV interests, Mid-America ranks last under the diversification criterion.

Best Practicable Service to The Public

Integration

91. In evaluating the applicant's integration proposals, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners — including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated" (*Policy Statement*, *supra*, at 395). The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Also, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979. Similarly, consultative positions will be given no weight. *Policy Statement*, 1 FCC 2d at 395. Thus, no integration credit will be awarded where a principal proposes to work in a non-managerial position. *Bradley, Hand and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982); *Scott & Davis Enierprises, Inc.*, 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 839 (Rev. Bd. 1981).

92. None of Koplar's principals will be integrated into the management of the proposed station. With respect to Omaha TV 15, Bernice Stephens-Dodd, a 15% stockholder, is proposed as full-time general manager. Dr. Dodd will run the day-to-day affairs of the station and supervise and direct all aspects of station operation. Omaha TV 15 will receive 15% full-time quantitative integration credit. There is no basis for questioning Dr. Dodd's integration proposal merely because she is a newcomer to broadcasting. It is a fundamental premise that lack of broadcast experience is remediable. *Policy Statement*, *supra*, 1 FCC 2d at 396, footnote 8. In addition, Dr. Dodd has stated that her commitment to work full-time in the capacity of general manager is indefinite (Tr. 304) and no evidence has been offered challenging the sincerity of her commitment or her ability to carry it out. More than unwarranted speculation is necessary to

deny credit for a principal's integration proposal. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982). Omaha TV 15's integration credit is qualitatively enhanced in that Dr. Dodd is a Black female, by her longtime local residence, and her involvement in Omaha civic activities. No other shareholder of Omaha TV 15 will be involved in the station's operation for a number of hours sufficient to warrant credit for integration. *Midwest, supra.* However, Omaha TV 15 stockholders Waldron-Coffee, Conley, Durham, Fitzgerald, Ford, and Zenon are entitled to an award of slight residual credit for local residence and civic participation since they intend to devote some time to station affairs. See *Midwest, supra.*

93. John Tyler, 51% partner of Channel 15/Omaha proposes to devote 30 hours per week to station operations as managing partner. Tyler plans to spend three days a week in Omaha although he intends to remain in Dallas, Texas. Tyler envisions his function as Chief Executive Officer for the proposed TV station. He plans to hire people for all major line positions. Thirty hours per week qualifies as substantial but not full-time. *Van Buren* Community Service, 87 FCC 2d 1018, 1021 (Rev. Bd. 1981). Channel 15/Omaha will receive 51% substantial quantitative integration credit. Local residence is not a prerequisite for an award of part-time integration credit. In addition, while full-time integration credit requires devotion to the station of substantial amounts of time on a daily basis, that is not necessary in the case of part-time proposals. *Greater Wichita, supra.* Tyler has made a specific commitment to be physically present in Omaha three days each week. His other commitments are not a bar to his effectuating his commitment. No evidence has been offered that this commitment will not be carried out. Omaha TV 15's contention that there is doubt that Tyler will actually go to Omaha to supervise the station is sheer speculation and surmise. It is also urged that Tyler will merely serve in a consultative capacity since he will not occupy a staff position. This contention is rejected. As managing partner, Tyler will serve as Chief Executive Officer for the proposed TV station. Tyler expressed his intent to ensure that programming is appropriate, public service commitments are lived up to, EEO regulations are complied with, and community needs are ascertained. These are critical management functions and demonstrate Tyler's intention to take a deep and personal management interest in the station. Awarding credit to him is fully consistent with the intent and objective of the *Policy Statement.* Tyler's integration credit is

qualitatively enhanced by his 30 years of broadcast experience. The Presiding Judge agrees with Channel 15/Omaha that the incidents described in paragraph 41, *supra*, which occurred over a decade ago at stations with which Tyler was associated may be dismissed as inconsequential. They have no effect on the qualitative enhancement of Channel 15/Omaha's integration proposal.

94. Larry Hudson, 83% stockholder in Mid-America, proposes to work at the station on a full-time basis, serving as general manager. Although not currently a local resident, Hudson proposes to move to Omaha if his application is successful. Mid-America will receive 83% full-time quantitative integration credit. Hudson currently spends 60 hours a week in connection with his Jefferson County CATV proposal. However, Hudson does not intend to personally manage the Jefferson County system and will hire outside management. Similarly, although Hudson is a principal in the Topeka, Kansas TV station, no evidence has been offered indicating that he proposes to devote time to the station's affairs. His other commitments are, therefore, no bar to his fulfilling his integration proposal. In the absence of evidence indicating that Hudson's integration proposal is not credible, Mid-America's integration proposal must be credited. Hudson has no prior broadcasting experience. In addition, no qualitative enhancement credit can be given for local residence and past participation in civic affairs. However, Hudson's proposed future residence in Omaha is entitled to some weight, although to a lesser degree than present local residence. *Policy Statement*, 1 FCC 2d at 396.

95. With respect to Family, Mattie Humphrey, a 10% stockholder, is proposed as full-time general manager. Family will receive 10% full-time quantitative integration credit. Contrary to Omaha TV 15's argument, the findings establish that Ms. Humphrey has an unconditional right to obtain ten percent of Family's shares. Similarly, the conversion feature contained in the February 24, 1982 agreement, discussed in footnote 26, *supra*, does not cast doubt on Family's commitment to Ms. Humphrey or dilute her ownership interest. As general manager, Ms. Humphrey will be solely responsible for the overall management of the day-to-day operations of the station. No evidence has been offered that she will be unable to effectuate her integration proposal. Contrary to Omaha TV 15's assertion, Ms. Humphrey's position as a member of the Board of Directors and its Executive Committee, the general policy making committee (Tr. 698), enhances her role under the integration criterion. Family's quanti-

tative integration proposal is qualitatively enhanced in that she is a Black female with prior broadcast experience and proposes to reside in Omaha.

96. Family also proposes to integrate Rogers (4.25% ownership), Goodwin (9% ownership), Milder (8.50% ownership) and Baccari (8.50% ownership) on a part-time basis (20 hours per week). Rogers is proposed as Director of Programming, responsible for all station programming and talent operations. Rogers intends to cut back his legal practice to spend the necessary time at the station. No evidence has been offered casting doubt on Rogers' effectuation of his integration proposal and the part-time proposal will be credited. The integration proposal is qualitatively enhanced since Rogers is a resident of Omaha and has prior broadcast experience. Goodwin is proposed as the station's Director of Community, Minority and Aged Affairs. Goodwin proposes to reduce his current work commitment to fulfill his proposed integration proposal. Goodwin has demonstrated that he will have the time available to effectuate his part-time integration proposal. Moreover, his staff position and the duties he will perform demonstrate he will perform a management role. Family will receive credit for Goodwin's part-time integration proposal. The integration proposal is qualitatively enhanced since Goodwin is Black, an Omaha resident and has been actively involved in its civic activities. Milder, who is proposed as Director of Sales, will be responsible for establishing sales policies and practices and will supervise the station's sales manager and sales staff. Milder will be performing a management role and the findings demonstrate that he will be able to effectuate the part-time integration proposal. The quantitative integration credit is qualitatively enhanced since Milder is a resident of Omaha and active in its civic affairs. Dr. Baccari is proposed as a medical and financial advisor to the station. In view of Dr. Baccari's stated intention to reduce his work load, it is concluded that he will be able to effectuate his part-time commitment. Notwithstanding, no quantitative integration credit is warranted for advisory or consultative positions such as that proposed by Dr. Baccari. Although he proposes to be involved in financial affairs before the station goes on the air, his main involvement when the station is operational is to develop health care programming, which will be broadcast approximately one half-hour a week. However, the decisions on what health programs are carried will be made by Rogers, the proposed program director. Dr. Baccari will not hold a management level position in the program area. Dr. Baccari also proposes

to be the station's "financial advisor." However, the station proposes to hire a full-time business manager who will be responsible for the day-to-day management of affairs, while the board of directors will be responsible for the overall policy direction. While no integration credit can be given for Dr. Baccari's proposed consultative role, he is entitled to slight residual credit for his involvement in the station because of his local residence. In this connection, Dr. Baccari lists no civic activities unrelated to his profession.

97. *Integration Summary* — Koplar does not propose to integrate any of its ownership into the management of the proposed station. Omaha TV 15 has received credit for 15% full-time integration. Omaha TV 15's integration proposal is qualitatively enhanced in that Dr. Dodd is a Black female, by her longtime local residence, and her involvement in civic activities. Omaha TV 15 also receives slight residual merit for the proposed limited participation of six of its stockholders. Channel 15/Omaha receives credit for 51% substantial (30 hours) integration. Channel 15/Omaha's integration proposal is qualitatively enhanced by his 30 years of broadcast experience. Mid-America receives credit for 83% full-time integration. Mid-America's integration proposal is qualitatively enhanced since Hudson proposes to move to Omaha. Family receives credit for 10% full-time and 21.75% part-time integration. Family's integration proposal is qualitatively enhanced in that Ms. Humphrey is a Black female, has prior broadcast experience and proposes to reside in Omaha. Also, Rogers is a resident of Omaha and has prior broadcast experience; Goodwin is Black, an Omaha resident and has been actively involved in its civic activities; and Milder is a resident of Omaha and civically active in Omaha. Family also receives slight residual merit for the proposed participation of Dr. Baccari.

98. Mid-America's proposal to integrate 83% of its ownership in management on a full-time basis is manifestly superior to that of its competitors and warrants a substantial preference. See *Poets Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980); *Radio Gaithersburg*, 72 FCC 2d 821 (Rev. Bd. 1979). Channel 15/Omaha argues that, at the most, Mid-America only warrants a slight to moderate preference over its proposed 51% substantial integration, citing *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 123 (Rev. Bd. 1980). The contention is rejected since the facts in that case are markedly different. In *Radio Greenbrier*, the proposed 50% substantial integration was enhanced by the applicant's long time local residence and active civic participation. Channel

15/Omaha can not make a similar claim. In fact, Tyler does not propose to become a resident of Omaha and unlike the applicant in *Radio Greenbrier*, does not intend to devote a substantial amount of time on a daily basis to the station. Hudson, on the other hand, proposes to become a resident of Omaha and will devote a substantial amount of time on a daily basis. Considering the Commission's emphasis on full-time participation and the differences in Hudson's and Tyler's intended implementation of their respective proposals, a substantial preference is merited. It is true that Omaha TV 15 and Family offer important qualitative attributes not present in Mid-America's integration proposal. However, in light of Mid-America's overwhelmingly superior quantitative proposal, these qualitative attributes do not lessen Mid-America's quantitative advantage. See *Radio Gaithersburg*, *supra*. Channel 15/Omaha's 51% substantial integration warrants a slight preference over Omaha TV 15 and Family and a moderate preference over Koplar who proposes no integration. Channel 15/Omaha is the only applicant, aside from Mid-America, who proposes to integrate a majority of its ownership into the station's operation. Channel 15/Omaha's preference would be greater except for the fact that Tyler does not propose to move to Omaha or devote substantial time on a daily basis. Also, Omaha TV 15 and Family propose some full-time integration. Both Family and Omaha TV 15 enjoy a slight to moderate preference over Koplar. Family enjoys a very slight preference over Omaha TV 15. The differences in full-time integration (15% and 10%) are nominal and are more than offset by Family's additional 21.75% part-time integration. Moreover, the qualitative attributes of the respective integrated owners are comparable and do not lessen Family's preference.

Auxiliary Power

99. Mid-America obtains no comparative credit for its emergency power source because this comparative factor only applies to applications for AM or FM facilities. The *Addendum to Policy Statement on Comparative Hearings*, 2 FCC 2d 667 (1966), cited by Mid-America, makes no mention of comparative television proceedings and no cases have been cited where the proposed use of an auxiliary power generator has been credited in a comparative television proceeding.

Final Comparative Evaluation

100. Family enjoys a preference under the diversification criterion and Mid-America enjoys a preference under the best practicable service criterion. While diversification normally is the decisive preference in comparative evaluations, this is not always the case. A diversification advantage may be outweighed by a more significant integration advantage. *Gilbert Broadcasting Corp.*, 52 RR 2d 429, 444 (1982); *Cleveland Television Corp.*, 52 RR 2d 581, 591 (Rev. Bd. 1982). It is concluded that Mid-America's substantial integration preference is of sufficient magnitude to overcome Family's moderate diversification preference. A different result may have been reached if Mid-America's media interests were in Omaha, the proposed service area, or were regionally significant. In the absence of these factors and on the basis of the significant differences between the respective integration proposals (Mid-America-83% full-time integration as opposed to Family-10% full-time, 21.75% part-time), Mid-America's application is preferred. Mid-America's application is also preferred over Channel 15/Omaha and Omaha TV 15. For the reasons stated in paragraph 98, *supra*, the integration differences are equally significant. In addition, the diversification advantages of Channel 15/Omaha and Omaha TV 15 are less than that of Family. It is therefore concluded that the public interest is better served by a grant of Mid-America's application. The ranking of the applicants is in the following order: (1) Mid-America, (2) Channel 15/Omaha, (3) Family, (4) Omaha TV 15 and (5) Koplar.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Mid-America Broadcasting, Inc. IS GRANTED and the applications of Omaha TV 15, Inc., Channel 15/Omaha, Koplar Communications, Inc., and Family Television, Inc. ARE DENIED.[30]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

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[30] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Intervention, Request for Denied

Review Board affirms ALJ's ruling denying petition for intervention. Petitioner's untimely request for intervention was designed to protect its private interests rather than to assist the Commission in the determination of the issues.
—*Satellite Relay, Inc.*
CC Docket No. 85-35

FCC 85R-86

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of	
Satellite Relay, Inc.	CC Docket No. 85-35
For Authority to Construct and Operate to Point-to-Point Microwave Common Carrier Radio Station at Evanston, Illinois	File No. 2546-CF-MP-83
and	
For Authority To Transfer Control from Jon W. Knudson to Ralph E. Evans, III	File No. 171-CF-TC-(1)-83

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 1985; Released: October 24, 1985

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed on September 5, 1985[1] by Earl J. Niemoth, Lawrence A. Myers, and Jon W. Knudson (Petitioner) from an *Order* released September 9, 1985[2] (FCC 85M-3513) by Administrative Law Judge (ALJ)

[1] The appeal was supplemented on September 10 and 11, 1985.

[2] The petition to intervene was filed on September 5 and the ALJ's denial of said petition was also issued on that date, although not released until September 9. Petitioner also filed with the Board an Emergency Motion for Postponement and Request for Immediate Action on September 5, which sought to defer the

Joseph Chachkin denying its petition to intervene in this proceeding. Petitioner, dissatisfied with its current status as a non-party witness, sought intervention to ensure that specific areas of law purportedly affecting its interests would be adequately litigated. The ALJ denied intervention on the ground that petitioner failed to meet the requirements of Section 1.223(c), 47 CFR § 1.223(c), which governs untimely filings, *i.e.*, petitioner's purpose was to protect its private interests rather than to assist the Commission in the determination of the issues; petitioner did not demonstrate how its participation would assist in the determination of the issues; petitioner's dissatisfaction with the legal presentation of counsel for the parties did not justify its attempt to intervene untimely; and petitioner's interests could be adequately protected under Section 1.27 of the Commission's Rules which provides for representation of witnesses by counsel. The appeal before the Board includes no new arguments and merely makes reference to the original intervention petition, which is appended to the appeal as an attachment. We are satisfied that petitioner's arguments have been adequately considered by the ALJ in accord with Commission precedent, *see, e.g., Hanover Radio, Inc.*, FCC 83R-66, released September 6, 1983 (Rev. Bd.) (intervention denied where appellant untimely sought to defend himself and failed to show how his participation as non-party witness was insufficient to explain his position), and that no useful purpose would be served by further discussion or repetition of these matters. The ALJ's ruling is therefore affirmed.

2. ACCORDINGLY, IT IS ORDERED, That the Emergency Motion for Postponement and Request for Immediate Action, filed September 5, 1985, and the Appeal of Denial by Administrative Law Judge Joseph Chachkin of Petition to Intervene, filed September 5, 1985, and supplemented on September 10 and 11, 1985 by Earl J. Niemoth, Lawrence A. Myers, and Jon W. Knudson, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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taking of Lawrence A. Myers' testimony scheduled that day, pending disposition of the instant appeal. Petitioner was informed orally the same day that its emergency motion had been denied. This *Order* memorializes that ruling.

Auxiliary Service
Emission Standards
Frequency Allocation

Frequency authorization procedures revised to allow for new technologies and reduced bandwidth equipment. Also, emission standards revised to permit spectrum efficient single sideband and technology to be licensed and implemented in the aural STL/ICR band without further Commission rule making.
—*Technical/Operational Requirements*
MM Docket No. 85-36

FCC 85-588

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of	
Review of Technical and Operational Requirements: Part 74-E Aural Broadcast STL and ICR Stations; and Part 74-F TV Auxiliary Broadcast Stations	MM Docket No. 85-36

REPORT AND ORDER

Adopted: October 31, 1985; Released: November 7, 1985

BY THE COMMISSION:

Introduction/Background

1. The Commission has under consideration, a *Notice of Proposed Rule Making* (*Notice*)[1] in the above captioned matter and the comments and reply comments filed in response thereto.[2] The

[1] Adopted on February 12, 1985, 50 FR 8172 (February 28, 1985).
[2] Comments were filed by: Association of Federal Communications Consulting Engineers (AFCCE); Association of Maximum Service Telecasters (MST); CBS, Inc (CBS); Electronic Industries Association — Consumer Electronics Group (EIA-CEG); Electronic industries Association — Fixed Point-to-point Section

Notice proposed to revise certain rules covering technical and operational requirements for Studio to Transmitter Links (STL), Intercity Relay (ICR), Television Pickup (TVP), and Microwave Booster (booster) stations. These stations are used to transmit program material and control signals from the studio to the broadcast transmitter and for relay of material between locations. The proposed actions would allow more flexibility for licensees and provide for more efficient use of the spectrum.

Issue 1: Frequency Authorization Procedures

2. To accommodate more users in the 950 MHz aural STL/ICR band, the *Notice* proposed to divide the band into 25 kHz stackable segments and to mandate narrower channel bandwidths after a five year period. The proposed maximum authorized channel bandwidth would correspond to the type of service of the station.[3] Current 500 kHz wideband channel operation could continue in areas of the country where spectrum crowding is not a problem. Comment was solicited on appropriate guidelines to determine areas of the country that would be required to convert to narrow channels. Also proposed was division of the 1990-2110 and 6875-7125 MHz bands into 1 MHz segments which could be stacked to provide flexibility in system development and implementation.

Aural STL/ICR channel band plan

3. The NAB opposed mandatory bandwidth reductions (after July 1990) for STL/ICR channels stating that there is no assurance narrowband equipment could or would be developed, thus, leaving broadcasters unable to comply with a Commission regulation. Others expressed concern that a 250 kHz channel would probably not support stereophonic audio plus ancillary channels for remote control and Subsidiary Communications

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(EIA-FPP); Geostar Corp (Geostar); Hubbard Broadcasting, Inc (Hubbard); Hughes Aircraft Company (Hughes); George Jackobs & Associates, Inc (Jackobs); John E. Leonard (Leonard); Marti Electronics, Inc (Marti); National Association of Broadcasters (NAB); National Broadcasting Company, Inc. (NBC); National Radio Broadcasting Association (NRBA); and Society of Broadcast Engineers (SBE). Reply comments were filed by: Hubbard; Hughes; and SBE.

[3] There is a severe shortage of 500 kHz channels in some areas to support the anticipated influx of new stations expected due to the rising costs of leased line facilities. SBE stated that, in some cases, costs for such services have gone up 300% to 1000% and that some stations may find it more economical to switch to a radio link.

Authorizations (SCA).

4. Several comments presented evidence that narrowband channel operation is possible immediately or in the very near-term. SBE presented data measured under actual STL/ICR operating conditions during field tests conducted in the Los Angeles, California area (a very spectrum congested market). Based on the SBE experience, both stereo and mono stations can be authorized the same bandwidths with a maximum of 250 kHz for AM stations and 375 kHz for FM stations, with no distinction between stereophonic and monophonic signals.

5. Leonard stated that "new technologies and techniques are available now to permit more efficient use of the spectrum available to this service. It is possible to design an aural STL system today using frequency modulation (FM) that provides 15 kHz audio response with a signal-to-noise ratio exceeding −70 dBm below program level and total harmonic distortion of less than .01%. Such a system using frequency modulation could exist in a total RF bandwidth of 125 kHz." He indicated that two such transmitters would only occupy 250 kHz of spectrum and that an additional 25 kHz channel could be authorized for secondary information. He also recommended that no distinction be made between AM and FM stations in regards to channel bandwidth.

6. Marti Electronics is presently producing and marketing narrowband systems internationally meeting the proposed channel bandwidths (although such bandwidths on the Marti system would not support stereo and a subcarrier service). The system includes two transmitters (and two receivers) using single carrier per channel (SCPC) techniques which are asserted to offer immunity to interference, lower cross talk, lower receiver noise threshold, and higher signal to noise ratio than multiplexed (composite) FM systems in stereo STL/ICR service. Marti also recommended authorizing an additional 25 kHz channel to provide a 20–7500 Hz audio channel suitable for subcarrier operation.

7. Considering the limited availability of spectrum for this purpose, the current availability of equipment, the high cost of leased common carrier channels, and the additional demand upon the 950 MHz STL/ICR band to accommodate new licensees, we believe that action is warranted on this issue. The record strongly supports the feasibility of narrowband aural STL/ICR operation provided that our proposed authorized channel bandwidths are adjusted to permit SCA and remote control signals. From a practical standpoint, the benefits of a single bandwidth for both stereophonic and monophonic channels appear to outweigh the

small savings in spectrum based on class of service.[4] Furthermore, the narrowband criteria of 300 kHz for FM and 200 kHz for AM stations appear to be a suitable compromise between our proposed narrower bandwidths and the wider bandwidths proposed in the comments. These bandwidths are capable of supporting full stereo audio and two limited audio channels.[5]

8. Although we solicited comment on how to select congested areas that would be authorized only narrowband operation, the record lacks any guidance in this area. The goal of this docket is to ensure that the spectrum is utilized efficiently and that additinal stations can be accomodated. The NAB stated that broadcasters can and do work together to use narrower bandwidths as the technical means for doing so are developed. We encourage the industry to work together in achieving the most efficient use of spectrum and will, in this *Order*, provide incentives to foster this approach.

9. A prospective applicant might be accommodated if an existing station or stations were to modify their STL/ICR equipment to use less bandwidth or better reject adjacent channel interference. This could be accomplished, for example, by one or more of the following techniques; a frequency shift, more directive antennas, installation of cavity filters, replacement of transmitter and or receiver. We expect the applicant to negotiate with existing licensed stations to incorporate reasonable changes with the applicant bearing the cost of such changes. The existing stations must accept reasonable modifications (at no cost to themselves) provided that the modifications result in substantially the same capabilities (i.e. similar program channels, remote control channel, and SCA) and the same interference protection to those channels.

10. As an incentive to operate efficiently, we will allow narrow bandwidth stations (300 kHz for FM and 200 kHz for AM) to lease additional capacity for broadcast and other uses. This lease would be considered to be on a "primary basis" because the station would already be narrowband. Other stations, not already narrowband, may also lease additional capacity, on a "secondary basis" subject to availability of 950 MHz spectrum for broadcast use. These secondary leased facilities cannot be considered in negotiations between stations (as described in paragraph 9), nor will such a lease be considered a valid reason not to modify a link for narrowband operation. Thus, unless a licensee is operating

[4] See SBE comments.
[5] See comments from Marti and Leonard.

under the narrowband criteria, lease of excess capacity is entirely at the licensee's own risk. (Local frequency coordinations may desire to keep information pertaining to leases with other station data in their databases, conceivably to act as an informational clearinghouse with respect to leasing operations).

2 and 7 GHz TVP and booster band plan

11. This band plan proposed to allow the continued use of microwave systems currently in use in these bands while allowing industry to develop equipment with narrower channel bandwidths. The band plan based on stackable channel segments that we proposed is more flexible than the rigidly structured, fixed channel assignment presently mandated. This approach would allow continued use of all present and new equipment designed for the current channel structures in the microwave bands and give licensees and manufacturers the option of implementing new technologies and spectrum efficient techniques without need for further Commission action. Only rigidly structured channel constraints are removed and, therefore, no equipment or systems need become prematurely obsolete under this plan.

12. Some Electronic News Gathering (ENG) organizations in congested areas use multiple receiver sites. These stations can operate more than one narrowband FM transmitter simultaneously on a single channel when more than one feed is required. In these instances, some signal quality can be sacrificed in favor of the additional fee.[6] The goal of this *Order* is to ensure that the Rules contain the flexibility necessary to foster the continuation of such innovative and spectrum efficient operation.

13. The record supports the proposal provided that implementation of the band plan proceeds in an orderly manner. The record reflects that stations already operating on split channels in the 2 and 7 GHz bands would require a segment smaller than 1 MHz to be accommodated.[7] Segment sizes of 6.25 MHz, 250 kHz, and 125 kHz were suggested rather than the proposed 1 MHz segment. The EIA-FPP suggested segments of 8.5, 8.333, and 8 MHz based upon division of current channels into halves or thirds but made no showing that equipment would actually require such bandwidths. We note that 250 kHz segments would accomplish the goals set forth in the *Notice*, and accordingly, are adopting the 250 kHz segment with maximum authorized channel band-

[6] See CBS comments.
[7] See SBE comments.

widths of 17 MHz in the 1990-2110 MHz band and 25 MHz in the 6875-7125 MHz band.

14. We will rely on the cooperation of licensees (for example, through local frequency coordinating committees) to decide upon the most efficient implementation of a band plan in each specific area. We expect that the conventional channel structure will serve as a guideline where possible to promote an organized transition as new technologies are developed and implemented.[8]

Issue 2: Emission Standards

15. The record supports revision of the emissions standards to include provision for Single Sideband (SSB) equipment to provide more flexibility in the design and operation of auxiliary systems. These standards are optional and the current FM standards will remain unchanged. Accordingly, the emission standards will be adopted as proposed.

Issue 3: TV auxiliary use of UHF-TV Channels

16. The EIA/CEG supported fixed auxiliary TVP sharing of the UHF-TV channels if the protection specified in Subpart G (Low Power TV and TV Translator Stations) is followed for the TVP stations. NBC, also supported fixed auxiliary sharing of the UHF-TV band on a secondary basis. Accordingly, auxiliary TVP sharing will be permitted on a secondary basis in the UHF TV band subject to the protection criteria in Subpart G.

17. Accordingly, we are adopting rules to permit fixed point-to-point auxiliary sharing of the UHF-TV band on a limited basis. These TV STL/ICR stations will be secondary to current and future full power TV allocations, LPTV authorizations, and translator authorizations. The STL/ICR licenses will also be secondary to current land mobile allocations and contingent upon the decisions of the pending *Notices of Proposed Rule Making* in Dockets 85-172 and 84-902 concerning additional use of the UHF-TV spectrum for land mobile operations.[9]

18. For processing purposes, we will apply the protection criteria specified in § 74.709 of the Rules to protect land mobile operations as allowed under Part 90, subpart L of the Rules.[10]

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[8] See comments from EIA-FPP.

[9] See *Notice of Proposed Rule Making*, Gen. Docket No. 85-172, 50 FR 25587 (June 20, 1985); *Notice of Proposed Rule Making*, Gen. Docket No. 84-902, 49 FR 45875 (November 21, 1984); and *Further Notice of Proposed Rule Making*, Gen. Docket No. 84-902, 50 FR 19956 (May 13, 1985).

[10] See 47 C.F.R. § 90.301 through § 90.315.

The interim protection criteria detailed in paragraphs 35 and 36 of the *Notice of Proposed Rule Making* in Docket No. 85-172 will be used to protect land mobile operations proposed in Dockets 85-172 and 84-902, pending the outcome of those proceedings. These steps should avoid interference between broadcast auxiliary and land mobile operations.

Issue 4: Remote Control

19. The record supports revision of the remote control rules to provide more flexibility in the design and operation of auxiliary systems.[11] Accordingly, the remote control rules will be adopted as proposed. We note, however, the *Notice of Proposed Rule Making* (in MM Docket No. 85-225)[12] proposed total flexibility for remote control operations for Part 74-A Experimental Broadcast Stations and for Part 74-I Instructional Television Fixed Service stations. In light of that proposal, we may further revise the remote control rules adopted here in a rules oversight proceeding.

Issue 5: Modification of Station Identification Requirement

20. Auxiliary licensees are currently required to periodically identify their on-the-air signals. It appeared, initially, that this requirement could be eliminated for fixed transmitters. The record indicates, however, that prompt identification of interfering signals is imperative and frequently, the call sign information on signals is the only means to locate the source of interference. It was also asserted, that this requirement is not a burden on licensees and should remain intact. Accordingly, the identification requirements will remain unmodified.

Other Considerations

21. The proposed revision of § 74.502 clarifying the secondary status of TV licensees using the 950 MHz band for aural service (as set forth in § 74.603) received support and will be adopted as proposed.

22. The comment received from Jacobs pertains to authorizing a class of stations to the 950 MHz aural STL/ICR band. That comment is beyond the scope of this proceeding because the Commission did not propose such action in the *Notice* and cannot,

[11] See comments from CBS and NAB.

[12] Published as 50 FR 30979 (July 31, 1985).

in this *Order*, amend the Rules without due process as set forth by the Administrative Procedures Act (APA).

Regulatory Flexibility Final Analysis

23. *Need and purpose of this action*: Through this decision, the Commission hopes to increase spectrum efficiency while allowing licensees maximum flexibility. The lack of spectrum to accommodate demands for auxiliary broadcast services necessitates that the current bands be used more efficiently.

24. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis*: No issues of significance were raised in addition to those set forth above.

25. *Significant alternatives considered and rejected*: The Commission considered the alternatives presented in the *Notice* and timely filed comments directed to the various issues in the *Notice*. After weighing all aspects of this proceeding, the Commission has adopted the course of action it deems most reasonable and as best service for the public interest under the Communications Act of 1934, as amended.

Paperwork Reduction Act

26. This order contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

Actions

27. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq*), (1981).

28. Accordingly, IT IS ORDERED that Part 74 of the Commission's Rules IS AMENDED as set forth in the attached Appendix A, to be effective December 16, 1985.

29. IT IS FURTHER ORDERED that Part 74 of the Commission's Rules IS AMENDED as set forth in the attached Appendix B, to be effective on the date specified in a future order to be issued by the Chief, Mass Media Bureau indicating that appropri-

ate computer programs are available for implementing the new rules.

30. The actions taken herein are pursuant to Section 5 U.S.C. § 553(d)(i). Authority for the actions taken herein is contained in Sections 4(i) and 303(r) of the Communications Act of 1935, as amended.

31. Further information on this proceeding may be obtained by contacting Hank VanDeursen, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Title 47 of the Code of Federal Regulations, Part 74 is amended (to be effective 30 days after adoption) as follows:

1. The authority citations for Part 74 continue to read as follows: Authority: 47 U.S.C. 154 and 303.

2. § 74.501 is amended by revising paragraphs (a) and (b) to read as follows:

§ 74.501 Classes of stations.

(a) Aural broadcast STL station. A fixed station for the transmission of aural program material between the studio and the transmitter of a broadcasting station other than an international broadcasting station.

(b) Aural broadcast intercity relay (ICR) station. A fixed station for the transmission of aural program material between broadcasting stations other than international broadcasting stations.

* * * * *

3. § 74.533 is amended by removing subparagraph (a)(4) and revising subparagraphs (a)(1), (2), and (3), to read as follows:

§ 74.533 Remote control and unattended operation.

(a) * * *

(1) The remote control system must provide adequate monitoring and control functions to permit proper operation of the station.

(2) The remote control system must be designed, installed, and protected so that the transmitter can only be activated or controlled by operators authorized by the licensee.

(3) The remote control system must prevent inadvertent transmitter operation

due to malfunctions in circuits between the control point and transmitter.

* * * * *

4. § 74.535 is amended by revising paragraphs (a), (b), and (c) to read as follows:

§ 74.535 Emission and bandwidth.

(a) For frequency modulation, the mean power of emissions shall be attenuated below the mean transmitter power (P) in accordance with the following schedule:

(1) On any frequency removed from the assigned frequency by more than 50% and up to 100% of the authorized bandwidth: at least 25 dB.

(2) On any frequency removed from the assigned frequency by more than 100% and up to 150% of the authorized bandwidth: at least 35 dB.

(3) On any frequency removed from the assigned frequency by more than 150% of the authorized bandwidth: at least 43 + 10 Log(P) dB.

(b) For all emissions except frequency modulation, the peak power of emissions shall be attenuated below the peak envelope transmitter power (P) in accordance with the following schedule:

(1) On any frequency 500 Hz inside the channel edge up to and including 25 Hz outside the same edge, the following formula will apply:

$$\text{Attenuation} = 29 \text{ Log } \left(\frac{25}{11}\right) (D + 2.5 - \frac{W}{2})^2) \text{ dB}$$

or 50 dB whichever is the lesser attenuation. Where: D is the displacement frequency (kHz) from the center of the authorized bandwidth; and W is the channel bandwidth (kHz).

(2) On any frequency removed from the channel edge by more than 2500 Hz: At least 43 + 10 Log (P) dB.

(c) In the event a station's emissions outside its authorized channel cause harmful interference, the Commission may require the licensee to take such further steps as may be necessary to eliminate the interference.

* * * * *

5. § 74.536 is amended by revising paragraph (a) to read as follows:

§ 74.536 Directional antenna.

(a) Aural broadcast STL and ICR stations are required to use a directional antenna with the minimum beamwidth necessary, consistent with good engineering practice, to establish the link.

* * * * *

6. § 74.550 is amended by revising the introductory text to read as follows:

§ 74.550 Equipment authorization.

Each authorization for aural broadcast STL, ICR, and booster stations shall require the use of notified or type accepted equipment, except that operation of 944-952 MHz equipment which has not been approved under the equipment authorization program may continue until July 1, 1990, after which, equipment must be approved. Requirements for obtaining a grant of equipment authorization are contained in Subpart J of Part 2 of the Rules. Equipment designed exclusively

for fixed operation shall be authorized under notification procedure (see §2.904(d) of this chapter).

7. § 74.551 is amended by revising subparagraphs (a)(1) and (2) to read as follows:

§ 74.551 Equipment changes.

(a) * * *

(1) A change in the ERP.

(2) A change in the operating frequency or channel bandwidth.

* * * * *

8. § 74.561 Frequency tolerance is amended by removing and reserving paragraph (a).

9. § 74.562 is amended by revising the introductory text to read as follows:

§ 74.562 Frequency monitors and measurements.

The licensee shall ensure that the STL, ICR, TVP, or booster transmitter does not exceed the emission limitations of Section 74.535. This may be accomplished by appropriate frequency measurement techniques and consideration of the transmitter emissions.

* * * * *

10. § 74.602 is amended by adding a new paragraph (i) to read as follows:

§ 74.602 Frequency assignment.

* * * * *

(i) TV STL and TV relay stations may be authorized, on a secondary basis and subject to the provisions of Subpart G of this chapter, to operate fixed point-to-point service on the UHF-TV channels 14-69. These stations must not interfere with and must accept interference from current and future full-power UHF-TV stations, LPTV stations, translator stations. They will also be secondary to current land mobile stations (in areas where land mobile sharing is currently permitted and contingent on the decision reached in the pending Dockets No. 85-172 and No. 84-902).

11. § 74.634 is amended by removing subparagraph (a)(4) and revising subparagraphs (a)(1), (2), and (3) to read as follows:

§ 74.634 Remote control.

(a) * * *

(1) The remote control system must be designed, installed, and protected so that the transmitter can only be activated or controlled by operators authorized by the licensee.

(2) The remote control equipment must be maintained to ensure proper operation.

(3) The remote control system must be designed to prevent inadvertent transmitter operation caused by malfunctions in the circuits between the control

point and transmitter.

* * * * *

12. § 74.637 is amended by revising paragraphs (a) and (b), and adding a new paragraph (f) to read as follows:

§ 74.637 Emissions and emission limitations.

(a) For frequency modulation, the mean power of emissions shall be attenuated below the mean transmitter power (P) in accordance with the following schedule:

(1) On any frequency removed from the assigned frequency by more than 50% and up to 100% of the authorized bandwidth: at least 25 dB.

(2) On any frequency removed from the assigned frequency by more than 100% and up to 150% of the authorized bandwidth: at least 35 dB.

(3) On any frequency removed from the assigned frequency by more than 150% of the authorized bandwidth: at least 43 + 10 Log(P) dB.

(b) For all emissions except frequency modulation, the peak power of emissions shall be attenuated below the peak envelope transmitter power (P) in accordance with the following schedule:

(1) On any frequency 500 Hz inside the channel edge up to and including 2500 Hz outside the same edge, the following formula will apply:

$$\text{Attenuation} = 29 \text{ Log } \frac{25}{11} (D + 2.5 - \frac{W}{2})^2) \text{dB}$$

or 50 dB whichever is the lesser attenuation. Where: D is the displacement frequency (kHz) from the center of the authorized bandwidth; and W is the channel bandwidth (kHz).

(2) On any frequency removed from the channel edge by more than 2500 Hz: At least 43 + 10 Log (P) dB.

* * * * *

(f) In the event a station's emissions outside its authorized channel cause harmful interference, the Commission may require the licensee to take such further steps as may be necessary to eliminate the interference.

APPENDIX B

Title 47 of the Code of Federal Regulations, Part 74 is amended (to be effective on the date specified in a future order to be issued by the Chief Mass Media Bureau) as follows:

1. The authority citations for Part 74 continue to read as follows: Authority: 47 U.S.C. 154 and 303.

2. §74.502 is amended by revising paragraphs (a) and (c) and adding new subparagraphs (a)(1), (2), and (3) to read as follows:

§ 74.502 Frequency assignment.

(a) The frequency band 944-952 MHz is available for assignment to aural STL and ICR stations. AM and FM broadcast stations shall have primary use of the band; however, TV broadcast stations may be licensed on a secondary, noninterference basis. One or more of the following 25 kHz segments may be stacked to form

a channel which may be assigned with a maximum authorized bandwidth of 300 kHz except as noted below. The channel, will be assigned by its center frequency, channel bandwidth, and emission designator. The following frequencies are the centers of each segment:

944.0125 944.0375, 944.0625, 944.0875, 944.1125, 944.1375, 944.1625, 944.1875, 944.2125, 944.2375, 944.2625, 944.2875, 944.3125, 944.3375, 944.3625, 944.3875, 944.4125, 944.4375, 944.4625, 944.4875, 944.5125, 944.5375, 944.5625, 944.5875, 944.6125, 944.6375, 944.6625, 944.6875, 944.7125, 944.7375, 944.7625, 944.7875, 944.8125, 944.8375, 944.8625, 944.8875, 944.9125, 944.9375, 944.9625, 944.9875, 945.0125, 945.0375, 945.0625, 945.0875, 945.1125, 945.1375, 945.1625, 945.1875, 945.2125, 945.2375, 945.2625, 945.2875, 945.3125, 945.3375, 945.3625, 945.3875, 945.4125, 945.4375, 945.4625, 945.4875, 945.5125, 945.5375, 945.5625, 945.5875, 945.6125, 945.6375, 945.6625, 945.6875, 945.7125, 945.7375, 945.7625, 945.7875, 945.8125, 945.8375, 945.8625, 945.8875, 945.9125, 945.9375, 945.9625, 945.9875, 946.0125, 946.0375, 946.0625, 946.0875, 946.1125, 946.1375, 946.1625, 946.1875, 946.2125, 946.2375, 946.2625, 946.2875, 946.3125, 946.3375, 946.3625, 946.3875, 946.4125, 946.4375, 946.4625, 946.4875, 946.5125, 946.5375, 946.5625, 946.5875, 946.6125, 946.6375, 946.6625, 946.6875, 946.7125, 946.7375, 946.7625, 946.7875, 946.8125, 946.8375, 946.8625, 946.8875, 946.9125, 946.9375, 946.9625, 946.9875, 947.0125, 947.0375, 947.0625, 947.0875, 947.1125, 947.1375, 947.1625, 947.1875, 947.2125, 947.2375, 947.2625, 947.2875, 947.3125, 947.3375, 947.3625, 947.3875, 947.4125, 947.4375, 947.4625, 947.4875, 947.5125, 947.5375, 947.5625, 947.5875, 947.6125, 947.6375, 947.6625, 947.6875, 947.7125, 947.7375, 947.7625, 947.7875, 947.8125, 947.8375, 947.8625, 947.8875, 947.9125, 947.9375, 947.9625, 947.9875, 948.0125, 948.0375, 948.0625, 948.0875, 948.1125, 948.1375, 948.1625, 948.1875, 948.2125, 948.2375, 948.2625, 948.2875, 948.3125, 948.3375, 948.3625, 948.3875, 948.4125, 948.4375, 948.4625, 948.4875, 948.5125, 948.5375, 948.5625, 948.5875, 948.6125, 948.6375, 948.6625, 948.6875, 948.7125, 948.7375, 948.7625, 948.7875, 948.8125, 948.8375, 948.8625, 948.8875, 948.9125, 948.9375, 948.9625, 948.9875, 949.0125, 949.0375, 949.0625, 949.0875, 949.1125, 949.1375, 949.1625, 949.1875, 949.2125, 949.2375, 949.2625, 949.2875, 949.3125, 949.3375, 949.3625, 949.3875, 949.4125, 949.4375, 949.4625, 949.4875, 949.5125, 949.5375, 949.5625, 949.5875, 949.6125, 949.6375, 949.6625, 949.6875, 949.7125, 949.7375, 949.7625, 949.7875, 949.8125, 949.8375, 949.8625, 949.8875, 949.9125, 949.9375, 949.9625, 949.9875, 950.0125, 950.0375, 950.0625, 950.0875, 950.1125, 950.1375, 950.1625, 950.1875, 950.2125, 950.2375, 950.2625, 950.2875, 950.3125, 950.3375, 950.3625, 950.3875, 950.4125, 950.4375, 950.4625, 950.4875, 950.5125, 950.5375, 950.5625, 950.5875, 950.6125, 950.6375, 950.6625, 950.6875, 950.7125, 950.7375, 950.7625, 950.7875, 950.8125, 950.8375, 950.8625, 950.8875, 950.9125, 950.9375, 950.9625, 950.9875, 951.0125, 951.0375, 951.0625, 951.0875, 951.1125, 951.1375, 951.1625, 951.1875, 951.2125, 951.2375, 951.2625, 951.2875, 951.3125, 951.3375, 951.3625, 951.3875, 951.4125, 951.4375, 951.4625, 951.4875, 951.5125, 951.5375, 951.5625, 951.5875, 951.6125, 951.6375, 951.6625, 951.6875, 951.7125, 951.7375, 951.7625, 951.7875, 951.8125, 951.8375, 951.8625, 951.8875, 951.9125, 951.9375, 951.9625, 951.9875.

(1) A single broadcast station may be authorized up to a maximum of twenty segments (500 kHz total bandwidth) for transmission of program material between a single origin and one or more destinations. The station may lease excess capacity for broadcast and other uses on a secondary basis, subject to availability of spectrum for broadcast use. However, an FM station licensed for twelve or fewer segments (300 kHz total bandwidth) or an AM station licensed for eight or fewer

segments (200 kHz total bandwidth) may lease excess capacity for broadcast and other uses on a primary basis.

(2) An applicant (new or modification of existing license) may assume the cost of replacement of one or more existing licensees equipment with narrowband equipment of comparable capabilities and quality in order to make available spectrum for its facilities. Existing licensees must accept such replacement without cost to them except upon a showing that the replacement equipment does not meet the capability or quality requirements.

(b) * * *

(c) [Reserved]

3. § 74.602 is amended by revising paragraph (a) to read as follows:

(a) The following frequencies are available to broadcast licensees for assignment to television pickup, television STL, and television relay stations. The bands 1990-2110 and 6875-7125 MHz are divided into 250 kHz segments. (The segment frequencies are from 1990.125 to 2109.875 MHz and from 6875.125 to 7124.875 MHz.) The segments may be combined to form a channel of appropriate bandwidth necessary to transmit television signals, but not exceeding that listed in the table below. The channel, will be assigned by its center frequency, channel bandwidth, and emission designator. It is recommended that channels be assigned according to the table below, provided that such channel bandwidths not exceed requirements. The bands 17,700-18,580 and 19,260-19,700 MHz are available as described in paragraph (i) below. Additionally, the band 38.6-40.0 GHz is available for assignment without channel bandwidth limitations to TV pickup stations on a secondary basis to fixed stations.

Equipment Authorization Program
Equipment Industrial, Scientific and Medical
Radio Frequency Device, Authorization
Technical Requirements

Regulations in Part 18 set forth technical standards to control interference from ultrasonic equipment, other than those types used for communication purposes. Medical equipment, in general, has already been granted an exemption from radio noise standards in Part 15 of the Rules.
—*Ultrasonic Equipment*
Gen Docket No. 85-303

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 18 of the FCC Rules to exempt medical ultrasonic diagnostic and monitoring equipment from technical standards.	GEN Docket No. 85-303

NOTICE OF PROPOSED RULE MAKING

Adopted: October 9, 1985; Released: October 17, 1985

BY THE COMMISSION:

Introduction

1. On April 28, 1983, Hewlett Packard Company (HP) submitted a petition (RM-4445) seeking the establishment of an exemption from the radio emissions standards in Part 18 of the FCC rules for certain types of medical ultrasonic equipment. The petition was denied by Commission *Order*, FCC 84-251, adopted on May 31, 1984, released June 7, 1984, on the basis that, considering the information available at that time, it appeared the risk of interference associated with an exemption would be too great. Since that time, medical equipment manufacturers have submitted additional information and tests of representative equipment samples have been conducted at the Commission's

laboratory which indicate that the risk of interference may indeed be considered acceptable. Accordingly, for the reasons given in the ensuing discussion, we are proposing to exempt medical ultrasonic diagnostic and monitoring equipment from the Part 18 technical standards.

Background

2. Part 18 sets forth requirements designed to control radio and TV interference that can be caused by industrial, scientific, and medical (ISM) equipment — equipment that generates radio frequency energy and applies it to a substance to affect its physical characteristics, exclusive of equipment used for communications purposes. Ultrasonic equipment generates radio frequency energy and applies it to a transducer to produce mechanical vibrations that, in turn, generate sound waves above the range of human hearing. Hence, ultrasonic equipment, except those types used for communication purposes, falls under the rules in Part 18. Ultrasound has long been used in the medical field for therapeutic purposes and, over the last decade or so, developments in the field of digital electronics and signal processing techniques have led to new types of medical equipment which use ultrasonic energy for a host of diagnostic and patient monitoring purposes. Applications for such equipment include fetal heart monitoring, blood flow measurements, and diagnostic imaging.

3. Part 18 sets forth special technical standards for ultrasonic equipment and requires that the equipment meet those standards prior to marketing.[1] In petitioning for an exemption from Part 18 for medical ultrasonic diagnostic and monitoring equipment, Hewlett-Packard argued that such equipment presented no more of an interference risk that other non-ultrasonic medical equipment which the Commission had already exempted from Part 15, Subpart J, which sets forth standards designed to control interference caused by equipment that employs digital electronics, referred to as "computing devices." By Report and Order in General Docket 81-461, adopted July 1, 1982, released July 9, 1982, 47 FR 31266, the Commission established an exemption

[1] Most ultrasonic equipment is subject to verification of compliance with the pertinent technical standards in Part 18, subpart C. See section 18.203 for details on the applicable equipment authorization requirements. The verification procedure is specified in Part 2, Subpart J. Basically, verification is a procedure whereby the manufacturer performs measurements to determine compliance with the technical standards and retains a record of the results in its files. Information is not routinely required to be submitted to the Commission.

from Part 15, Subpart J, for specialized medical computing devices generally used at the direction of or under the supervision of a licensed health care practitioner. Reference Section 15.801(c)(5).

4. As pointed out in Gen. Docket 81-461, a number of factors contributed to the Commission's decision to exempt medical equipment from the computing device rules, including the following: there had been no known reports of interference caused by medical equipment; there would be extreme difficulties and high costs in performing radiated emissions measurements on an open field test site for certain types of medical equipment, such as CAT scanners and X-Ray machines; because medical equipment must be capable of operating in a high noise environment, shielding is generally employed that, in turn, tends to reduce the levels of emissions; such equipment is already regulated by other Federal Government agencies; and, the Food and Drug Administration has, in place, a mechanism for reporting any problems that develop with medical equipment. HP argued that these same factors similarly apply to medical ultrasonic diagnostic and monitoring equipment. HP claimed that the vast majority of manufacturers of such equipment was unaware that Part 18 applied to diagnostic or monitoring equipment; consequently, most had not applied to the Commission for equipment authorization.

5. The Commission cited several reasons for its denial of the HP petition. Although no negative comments were filed against the petition, there was concern that such equipment posed a greater risk of interference than equipment that simply employs digital electronic circuitry.[2] This stemmed from the fact that the equipment appeared to use higher levels of radio frequency energy to drive the ultrasonic transducer than is generally employed by equipment that only utilizes digital electronics. (Several watts are sometimes applied to an ultrasonic transducer vs. typically a few milliwatts employed by a digital electronic circuit). Further, medical diagnostic equipment did not have a good record of

[2] As with digital electronics, the emissions that result from an ultrasonic generator can extend over a broad range of frequencies. The fundamental frequency of an ultrasonic generator can range anywhere between 40 kHz and 15 MHz, and significant harmonics may be observed as high as 100 MHz, or higher in some cases. Thus, emissions may occur in the frequency bands utilized by a number of radio services, including AM broadcast, TV, and several amateur frequency bands. However, the mere fact that emissions are present does not in and of itself mean that there is a significant risk of interference. Other factors, such as strength of the emissions and proximity to receivers must be taken into account.

compliance with the Part 18 technical standards, with 8 out of 20 pieces of equipment submitted for equipment approval up to that time having failed to meet the pertinent standards. Finally, in contrast to the measurement problems posed by equipment such as CAT scanners and X-ray machines, it did not appear that tests for medical ultrasonic equipment would be particularly difficult; neither the equipment size (most units are designed to either sit atop a table or to be mounted in a small rollaway cart) nor special operating requirements, preclude measurements of radiated emissions on an open field test site. Although the petition for an exemption was denied, the Commission stated that an open meeting with the Commission staff would be held to discuss possible relaxation of the Part 18 technical standards and simplification of the measurement procedures for such equipment.

Results of Open Meeting between Industry and FCC Staff

6. On August 21, 1984, an open meeting was held between members of the staff of the Office of Science and Technology and those parties affected by the regulations pertaining to medical ultrasonic equipment. The attendees included representatives of the American Radio Relay League (on behalf of amateur radio operators), the Association of Maximum Service Telecasters (on behalf of UHF TV broadcasters), the American College of Radiology, and about a dozen manufacturers of medical ultrasonic equipment. At that meeting, the manufacturers reaffirmed HP's earlier position that such equipment posed no greater interference threat than medical computing devices and should therefore be exempt. Further, the manufacturers asserted that many more types of medical ultrasonic equipment existed than just those the Commission had encountered in its type approval testing and the magnitude of the effort required to test some machines would indeed be great. It was agreed that manufacturers, under the auspices of the Health Industry Manufacturers Association (HIMA) and the National Electrical Manufacturers Association (NEMA), would provide further information on the various types of medical ultrasonic diagnostic and monitoring equipment and their technical characteristics. In addition, the manufacturers agreed to furnish a list of their products from which the Commission could select units to measure the levels of emissions and evaluate the interference potential. The information and list were submitted jointly by HIMA and NEMA on December 21, 1984.

Results of Commission Laboratory Investigation

7. Eight pieces of medical ultrasonic equipment were selected for tests at the Commission's Laboratory in Columbia, Maryland. The results of the tests are being made available in the FCC Laboratory Report in Project No. 2226-6 entitled "Investigation of the Interference Potential of Medical Ultrasonic Diagnostic Equipment," a copy of which has been inserted in the record for this proceeding. The primary focus of the tests was to determine whether the ultrasonic generator in the equipment produced significantly higher emissions than the digital electronics contained in that equipment, otherwise exempt. Additionally, the emission levels were compared against the levels permitted for computing devices under Part 15, Subpart J, and the limits for ultrasonic equipment in Part 18, Subpart C, as frames of reference for evaluating the interference potential. Greater weight was given to comparison with the limits for computing devices because they are better supported technically and reflect more recent study.[3]

8. There were a number of notable results from the laboratory tests. The ultrasonic section of the equipment produced additional radio noise to that generated by the digital electronics contained in the equipment; however, the levels of emissions associated with the ultrasonic section did not stand out as characteristically more severe than emissions produced by the digital electronics.[4] Only 4

[3] The technical standards and measurement procedures for computing devices, set forth in Part 15, differ significantly from those for ultrasonic equipment, set forth in Part 18. The standards for ultrasonic equipment are generally more stringent than the standards for computing devices intended for use in commercial or business environments (Class A computing device standards). However, the dichotomy in limits is due in large part to different approaches to the establishment of limits and not because there is some fundamental technical reason why the limits should be different. The limits for ultrasonic equipment were developed some 30 years ago and were based on engineering judgements of the potential interference effects on communications systems at that time. The computing device limits were developed in the late 1970's and are based on detailed technical analyses and measurements of interference effects on more contemporary communications systems. We plan to rectify the differences between the limits in Parts 15 and 18 at some point in the future.

[4] There was no apparent pattern to the relationship between the levels of emissions attributable to the ultrasonic generator vs. the digital electronics. In any given machine, the emissions due to the ultrasonic generator may be higher or lower than those due to the digital electronics. The statement that the emissions due to the ultrasonic generator are not significantly greater than from the digital electronics is based upon evaluation of the entire group of equipment.

out of 8 units met the limits for computing devices in Part 15, Subpart J; however, analysis of the test data reveals that this is not as serious as it may seem. Seven of the units met the power line conducted emissions limits for computing devices, and the data on the eighth unit was inconclusive.[5] As to the limits for radiated emissions, four of the units had no measureable emissions whatsoever at the distance at which the computing device limits are specified (30 meters). The other four units exhibited radiated emissions higher than that permitted for computing devices. Specifically, the worst emissions from each unit exceeded the limits by 1.3 dB at 44.3 MHz, 6 dB at 60.8 MHz, 9.4 dB at 33.3 MHz, and 12.5 dB at 30 MHz. It would not be unusual to encounter signals of those levels in routine measurements of ordinary computer equipment or other equipment that contains digital electronics. Only 2 out of 8 units met the limits for ultrasonic equipment in Part 18, Subpart C; however, as explained earlier, this was not given as much weight as was the comparison to the computing device limits.

Discussion

9. We recognize that medical equipment is highly regulated and that the costs of medical care are of great concern to society. Because of this, we must consider carefully the impact of FCC regulations on medical equipment and whether there is a demonstrated need for those rules. Through the cooperative efforts of the staff and the medical industry, sufficient information has been developed to show that an exemption from the Part 18 rules for medical ultrasonic diagnostic and monitoring equipment may be warranted.

10. Based on our laboratory tests, it appears that the levels of emissions generated by medical ultrasonic diagnostic and monitoring equipment are indeed about the same as that generated by medical equipment that simply employs digital electronics and has been exempted from Part 15. While we earlier expressed reservations about the degree to which the underlying arguments favoring Part 15 exemption for medical equipment applied to the equipment in question here, those concerns stemmed largely from

[5] As discussed in the laboratory report, the power line conducted measurements for one unit raised a question as to whether it complies with the standards for computing devices. The question could not be investigated further because the equipment had to be returned to the manufacturer. Thus, it could not be stated conclusively whether this unit met the line conducted emission limit for computing devices.

the question of whether medical ultrasonic diagnostic equipment was unique from the standpoint of emissions characteristics. The equipment has been shown not to be unique and our previous concerns are greatly mitigated.

11. There are several factors that lead to the conclusion that the risk of interference would be minimal if the equipment in question were made exempt from Part 18. Our test results seem to indicate that a substantial portion of the products in question will meet our standards governing radio noise from digital electronic equipment even without a mandatory requirement. Further, it appears that those units that do not meet the limits will tend to exceed them by only a small margin. In any event, we expect that this will be counterbalanced by the fact that most medical equipment of this type will be used in the controlled environment of hospitals and clinics, which are usually separated from TV and other receivers by much more than the 30 meter protection distance assumed in establishing our computing device rules for equipment used in a business environment. We note that there are no known reports of interference caused by the subject equipment.

12. We recognize that there may be some risks of interference associated with an exemption; however, we believe the risks are minimal and are far outweighed by the benefits to be derived. Therefore, we are proposing to exempt medical ultrasonic diagnostic and monitoring equipment from the Part 18 technical requirements. The specific text of the proposed rule change is shown in the Appendix. Such equipment will only remain subject to the general requirement that harmful interference must be corrected if it occurs. We are not proposing to exempt medical ultrasonic equipment used for therapeutic purposes. Substantially higher power can be and is used for therapeutic purposes.

13. Had we not found there to be adequate basis for an exemption, we would have, at minimum, proposed that the Part 18 technical standards for this equipment be relaxed to be the same as permitted for computing devices (Class A for equipment intended for use in a commercial environment and Class B for equipment intended for use in a residential environment). The computing device limits have proven satisfactory for controlling interference and there is no apparent reason to perpetuate more severe limits in Part 18 for medical ultrasonic diagnostic and monitoring equipment. In the event that information is submitted showing that the proposed exemption is inappropriate, we may consider adopting alternative limits as noted herein. It should be

noted that the Part 18 rules were recently revised, relaxing the equipment authorization requirement for ultrasonic equipment to verification, the Commission's least burdensome equipment authorization procedure. See the *Third Report and Order* in General Docket 20718, adopted August 5, 1985, published in the Federal Register on September 5, 1985, at 50 FR 36061.

Procedural Matters

14. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq. the Commission issues the following initial regulatory flexibility analysis:

I. *Reason for action*

This notice proposes to exempt medical ultrasonic diagnostic and monitoring equipment from technical standards in Part 18 of the Rules that are designed to control radio and TV interference. The proposal responds to requests from manufacturers of such equipment.

II. *The objective*

The objective of the proposed rule change is to provide relief from regulations that may not be necessary to control interference from the subject type of equipment.

III. *Legal basis*

The action proposed is in furtherance of Sections 4(i), 302(a), 303(g) and 303(r) of the Communications Act of 1934, as amended, which permit the Commission to make reasonable regulations governing the interference potential of RF equipment and to promote the larger and more effective use of radio in the public interest.

IV. *Entities affected; nature of economic impact; significant alternatives*

This action would affect manufacturers of medical ultrasonic diagnostic and monitoring equipment. The proposed exemption, if ultimately adopted, would relieve manufacturers of the costs of compliance with specific radio emissions limits. An alternative to an exemption, would be a relaxation of the current technical standards.

V. *Recording, record-keeping and other compliance requirements*

The equipment in question is currently required to be verified by the manufacturer as complying with FCC technical standards, with a copy of the verification to be retained in the manufacturer's records. Under this proposal, verification would no longer be required and there would be no record-keeping or other compliance requirements.

15. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time that a public notice is issued stating that a substantive disposition of

the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules 47 C.F.R. Section 1.1231.

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labelling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

17. Pursuant to the applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before November 25, 1985, and reply comments on or before December 10, 1985. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information on this proceed-

ing, contact the Office of Science & Technology, tel: (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

1. The authority citation for Part 18, including the proposed new Section 18.104, continues to read as follows:
Authority:

Secs. 4, 303, 307, 48 Stat. 1066, 1082, 1093, as amended; sec. 303, 82 Stat. 290; 47 U.S.C. 154, 302, 303, 307.

2. 47 CFR Part 18 is proposed to be amended by adding a new rule section to read as follows:
Section 18.104

Exemptions

Medical ultrasonic diagnostic and monitoring equipment is exempt from the technical and administrative requirements of this Part. Although exempt, such equipment remains subject to the general operating conditions of Section 18.111 and provisions of Sections 18.113 through 18.117 regarding elimination of harmful interference. Although not mandatory, it is strongly recommended that manufacturers endeavor to have such devices meet the technical standards herein.

Note: Medical ultrasonic equipment used for therapeutic purposes is not covered by this exemption.

Common Carrier, Accounting System

Report and Order adopted incorporating generally accepted accounting principles into the Uniform System of Accounts being developed in CC Docket No. 78-196.
—*Uniform System of Accounts*
CC Docket No. 84-469

FCC 85-581

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles (Parts 31, 33, 42, and 43 of the FCC's Rules)	CC Docket No. 84-469

REPORT AND ORDER

Adopted: October 31, 1985; Released: November 14, 1985

BY THE COMMISSION:

I. INTRODUCTION

1. In a Notice of Proposed Rulemaking (NPRM) released on May 18, 1984, 49 FR 21377 (May 21, 1984), the Commission proposed to revise Parts 31, 33, 42 and 43 of its Rules to accommodate generally accepted accounting principles (GAAP)[1] to the extent practicable.

[1] GAAP is that common set of accounting concepts, standards, procedures and conventions which are recognized by the accounting profession as a whole and upon which most nonregulated enterprises base their external financial statements and reports. It directs the recording of financial events and transactions and relates to how assets, liabilities, revenues and expenses are to be identified, measured, and reported. In very broad terms, these principles can be summarized as requiring that assets and liabilities be recorded at historical cost; that revenue be realized when the earning process is complete and an exchange transaction has occurred; that costs be matched with the revenues they helped to generate; that disclosure be full and adequate; that accounting

2. Based on an analysis of the comments received in this proceeding, we have decided to adopt GAAP as proposed in our NPRM with some modifications as discussed in succeeding paragraphs. The amendments described herein will become effective when the revised Uniform System of Accounts (USOA) being developed in CC Docket 78-196 becomes effective.

II. BACKGROUND

3. In October of 1981, the Commission issued a *Second Supplemental Notice Of Proposed Rulemaking and Order (Second Supplemental Notice)*, 88 FCC 2d 83 (1981), in Docket No. 78-196. In the *Second Supplemental Notice*, we established a federal advisory committee, the Telecommunications Industry Advisory Group (TIAG), and charged it with developing and recommending a revised USOA based generally on financial principles and capable of supporting separate, parallel costing and separations subsystems. Among other things, the TIAG was to develop a recommendation on the extent to which GAAP should be used in a revised USOA.

4. In response to its mandate, on January 20, 1984, the TIAG filed with the Commission its report entitled "Discussion Paper on Application of Generally Accepted Accounting Principles in a Revised Uniform System of Accounts" (Report). Included as a part of the Report are additional comments on the subject by the National Association of Regulatory Utility Commissioners (NARUC), which is an active participant in TIAG activities.

5. In general, the Report recommended that: the USOA provide for compliance with GAAP, although not irrespective of economic effects of regulation; the USOA provide for automatic adoption of future changes in GAAP, absent Commission notice to the contrary; the effects of differing accounting and rate-making practices adopted by various regulatory authorities with respect to the same cost of service components be summarized in the general books of account; and the nonregulated activities, in which a regulated telephone company may be involved, be subject to GAAP consistent with nonregulated enterprises.

6. Additionally, the Report identified 21 accounting practices required by the current USOA, 47 C.F.R. Parts 31 and 33, that differ from GAAP. Only three of these changes — accounting for income taxes; capitalized leases; and compensated absences —

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principles be applied consistently between accounting periods; and that accounting data be objectively determined and verifiable.

would result in a significant revenue requirement impact if adopted. The Report further recommended that the Commission initiate a separate rulemaking proceeding to address the full adoption of GAAP in the revised USOA. On May 10, 1984 the Commission issued a notice of proposed rulemaking to address the Report's recommendations on GAAP.

III. SUMMARY OF PROPOSAL

7. The NPRM proposed to adopt the concept of GAAP as a whole with added emphasis to be placed on the economic effects of regulation and to provide for adoption of future changes to GAAP subject to a Commission review period of 90 days. We also proposed reserving the Commission's right to determine materiality instead of adopting the GAAP definition of materiality.

8. Further, the NPRM proposed adding three accounts in the USOA to record the deferred charges and credits and the net income effects arising from differing accounting and ratemaking practices adopted by various regulatory bodies. The NPRM also proposed to refrain from applying regulatory rules to the nonregulated activities of regulated carriers.

9. In addition, we proposed to adopt GAAP with respect to early extinguishment of debt; investment in plant; account 232 — station connections — (inside wiring); valuation of inventories held for resale; variable payment contracts; directory revenues and expenses; sales of embedded terminal equipment; investment in common stock of affiliates; pension costs and deferred compensation arrangements; prior period adjustments; extraordinary items; convertible debt and debt issued with stock purchase warrants; business combinations; treasury stock; accounting for contingencies; security investments other than common stock of affiliates; investment tax credits; and capitalizing interest during construction. We did, however, request additional comments on interest during construction; pension costs; prior period adjustments and extraordinary items; and contingencies.

10. Finally, we proposed to adopt GAAP in the areas of normalization,[2] capitalized leases and compensated absences subject to the satisfactory resolution of the issues and questions concerning their revenue requirement impact.

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[2] Our decision with respect to normalization in this Order will have no effect on the treatment of taxes in the *Pole Attachment Proceedings*.

IV. SUMMARY OF COMMENTS

11. Interested parties were invited to file comments on or before June 25, 1984, and reply comments on or before July 10, 1984. Comments were received from Colorado Public Utilities Commission (CPUC); Continental Telcom Inc. (Contel); Florida Public Service Commission (FPSC); GTE Service Corporation (GTE); Idaho Public Utilities Commission (IPUC); International Communications Association (ICA); Kentucky Public Service Commission (KPSC); Michigan Public Service Commission (MPSC); New York State Department of Public Service (NYDPS); Office of Consumer Advocate, Commonwealth of Pennsylvania (OCA-PA); United States Telephone Association (USTA); and United Telephone System, Inc. (UTS). Comments and reply comments were received from American Telephone and Telegraph Company (AT&T); BellSouth Corporation (BellSouth); Southern New England Telephone Company (SNET); and The Operating Telephone Companies (OTCs).[3] Reply comments were also received from Centel Corporation (Centel); and The Ameritech Operating Companies (Ameritech)[4] Comments were received after the comment and reply comment period expired from Arthur Andersen & Co. (Arthur Andersen). Since no objections were made to this late filing of comments we have decided to take them into consideration in this proceeding.

12. All respondents, except one, agreed that the new USOA should accommodate GAAP. They differ, however, as to the extent to which individual aspects of GAAP should be applied to the majority of issues set forth in NPRM. The areas of concern were: (1) whether the USOA should rely on the Financial Accounting Standards Board (FASB)[5] Statement No. 71 in accom-

[3] The Operating Telephone Companies include the following Bell Operating Companies: the Bell Telephone Company of Pennsylvania; the Chesapeake and Potomac Telephone Companies; the Diamond State Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company Incorporated; Michigan Bell Telephone Company; the Mountain States Telephone and Telegraph Company; Nevada Bell; New England Telephone and Telegraph Company; New Jersey Bell Telephone Company; New York Telephone Company; Northwestern Bell Telephone Company; the Ohio Bell Telephone Company; Pacific Bell; Pacific Northwest Bell Telephone Company; Southwestern Bell Telephone Company; and Wisconsin Bell.

[4] The Ameritech Operating Companies are comprised of Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; the Ohio Bell Telephone Company; and Wisconsin Bell, Inc.

[5] The Financial Accounting Standards Board is the main body which promulgates accounting standards for general purpose financial statements. Other standard setting bodies are academia and the Securities and Exchange Commission.

modating GAAP; (2) whether future changes to GAAP should be adopted automatically; (3) whether the GAAP concept of materiality should be incorporated in the USOA; (4) whether accounts for jurisdictional differences should be included in the USOA; (5) whether nonregulated activities should be accounted for pursuant to GAAP for nonregulated entities; (6) whether interest during construction should be capitalized on both debt and equity funds or debt funds solely; (7) whether pension expenses should be accrued when the amounts are not funded; (8) whether the FCC should review unusual items; (9) whether the USOA should allow carriers to recognize contingencies; (10) whether the USOA should allow full normalization accounting for all tax timing differences; (11) whether the USOA should allow carriers to capitalize leases; and (12) whether the USOA should require carriers to accrue for compensated absences.

Adoption of GAAP and Reliance on FASB 71.

13. The major issue raised in the comments deals with the extent to which the USOA should rely on FASB 71 in accommodating GAAP.[6] CPUC, FPSC, KPSC, MPSC and NYDPS all favor GAAP with heavy emphasis on FASB 71. In support of this position, CPUC, FPSC and MPSC cite the fact that FASB 71 gives the regulatory body the option of deciding on a case-by-case basis what accounting treatment is appropriate, especially when there could be a change in the cost of utility service. NYDPS believes that the USOA must fully recognize FASB 71 because in its opinion the accounting required of regulated enterprises should reflect the actual ratemaking policies under which companies operate; regulatory accounting practices depart from GAAP in many instances due to the fact that GAAP is not relevant to regulated entities and failure to recognize FASB 71 would distort the proper accounting and ratemaking policies applied to regulated utilities. Additionally, NYDPS states that increased competition is not a justifiable reason for the wholesale adoption of

[6] Statement of Financial Accounting Standards No. 71 (FASB 71) "Accounting for the Effects of Certain Types of Regulations" continues the requirement that general purpose financial statements of regulated enterprises conform to GAAP, with appropriate applications of these principles to reflect the economics of the ratemaking process (when the conditions of probable recovery are met).

GAAP without recognition of regulatory policies.

14. AT&T, BellSouth, Contel, GTE, OTCs, SNET, USTA and UTS, on the other hand, oppose substantial reliance on FASB 71 in the new USOA. AT&T, GTE, OTCs, USTA and UTS believe that FASB 71 is not relevant in the competitive environment because prices must be based on market conditions. AT&T, BellSouth and OTCs also state that GAAP should be adopted for both accounting and ratemaking purposes because regulators cannot guarantee full cost recovery in today's environment.

15. Other reasons given to support GAAP absent FASB 71 were consistency and comparability between regulated and nonregulated companies (AT&T, Arthur Andersen, SNET, USTA and UTS); better measurement of financial performance and proper matching of revenues and expenses (AT&T, Arthur Andersen and OTCs); and, the easing of both regulatory and administrative burdens (Contel).

16. AT&T believes that both interexchange carriers and regulated monopoly carriers should be permitted to adopt GAAP on a flash cut basis for the 18 changes in the NPRM which have negligible revenue requirement impacts. In addition, AT&T states that GAAP changes which could have significant revenue requirement impacts should also be adopted for interexchange carriers for ratemaking and regulatory accounting purposes, with an appropriate transition mechanism. The transition would be accomplished by applying GAAP to prospective amounts and phasing in GAAP with respect to embedded deferred amounts of taxes and compensated absences over a period of 5 years. The phasing in of embedded amounts in the revenue requirements would provide a reasonable opportunity for interexchange carriers to recover legitimately incurred costs in the provision of telecommunications services to the public.

17. BellSouth and the OTCs, on the other hand, state that GAAP should be applied, absent FASB 71, only to prospective amounts. They feel that prospective application is best so as to guarantee the recovery of deferred expenses in future revenue streams.

18. Several respondents, while favoring the adoption of GAAP absent FASB 71 as the ultimate goal, couched their comments in such a way as to accommodate FASB 71 if the Commission were to favor its embodiment in the USOA. Contel and USTA state that FASB 71 could be accommodated on a short-term basis but should be eventually phased out for much of the same reasons mentioned previously. Arthur Andersen suggests applying FASB

71 only when the circumstances warrant application; BellSouth recommends recording differences caused by FASB 71 in jurisdictional accounts; and SNET states that FASB 71 should not be incorporated into the book of accounts but only in external financial reports.

19. As mentioned earlier, only one respondent opposed the adoption of GAAP in any form in the USOA. That respondent was OCA-PA, which opposes GAAP because the current USOA has worked well without GAAP; GAAP based financial statements are already available from other sources; GAAP will not fulfill any of the seven functions the original NPRM sought to address (NPRM at p.2); and, the ratepayers would experience adverse effects from adoption through increased rates.

20. In their reply comments, AT&T, Ameritech, BellSouth and OTCs support the adoption of GAAP absent FASB 71. Their reasons are, for the most part, the same as those espoused by the commenting parties in favor of this position.

21. Both Ameritech and the OTCs in their reply comments oppose the state commissions desire to rely on FASB 71 in the new USOA. Ameritech states that the concerns of the state commissions over the effect of GAAP on the cost of service are really concerns over the pricing of service in the new competitive environment. It claims that in this environment, costs must be recovered from cost causers because the future holds no guarantees. Ameritech believes that GAAP merely recognizes the realities of the new competitive environment. The OTCs contend that the maintenance of the status quo as urged by the state commissions is founded on the assertion that ratemaking should determine accounting and ignores the economic reality of the changes taking place in the telecommunications marketplace.

22. BellSouth states in its reply comments that, contrary to NYDPS' assertion that GAAP is sometimes not relevant to regulated entities, the competitive marketplace makes the accounting methods followed by nonregulated businesses very relevant to regulated businesses.

23. The OTCs in their reply comments object to AT&T's position that GAAP be applied to interexchange carriers only. They believe that this would promote inconsistent treatment among carriers and would cause problems for carriers such as Contel, GTE, OTCs and UTS which have both exchange and interexchange operations. Therefore, the OTCs restate their belief that, to the extent GAAP is adopted by the Commission, it should be applied to all carriers so that uniform accounting

standards are maintained in the industry.

24. AT&T, in its reply comments, reiterates its belief that interexchange carriers should be allowed to adopt GAAP absent the effects of regulation as soon as possible. It states that the standards applicable to regulated monopoly firms are not appropriate for competitive carriers and that for competitive carriers the marketplace requires that costs be recognized as incurred and not deferred to future periods so that the carrier can have the opportunity to fully recover its costs of supplying service. AT&T also states in its reply comments that in response to the need for a gradual, cautious approach to implementing GAAP for monopoly carriers, the Commission should adopt the recommendations with negligible impact for all carriers while delaying implementation for monopoly carriers of those recommendations with significant ratemaking impact. Monopoly firms would implement the latter recommendations when market forces have become viable to assure that the public interest is protected. While AT&T admits that this will cause interexchange and exchange carriers to be on different accounting bases, it sees no need for concern since AT&T itself accounted for compensated absences differently than the rest of the telecommunications industry for many years with no ill effect.

25. AT&T further states that it opposes the position of those parties favoring only the prospective application of GAAP. By applying GAAP only to prospective amounts, the economic effects of regulation will continue to be recognized almost indefinitely with respect to embedded deferred amounts. AT&T believes that, while this may be an acceptable approach for local exchange carriers, interexchange carriers should apply GAAP to both prospective and embedded amounts, with the embedded amounts being phased into the revenue requirements over a five year transition period.

26. AT&T further submits in its reply comments that its analysis of the revenue requirement impacts of implementing GAAP over a five year period shows the full estimated impact on the interexchange segment of the industry since the other interexchange carriers already follow GAAP. In addition, AT&T maintains that the revenue requirement impacts of adopting GAAP for interexchange carriers would be only a fraction of the impact that would result from applying GAAP for all carriers and that adopting GAAP for interexchange carriers would not affect local service rates.

Automatic Adoption of Future GAAP Changes.

27. The majority of respondents are concerned with the proposal to implement changes to GAAP automatically, subject to Commission review. CPUC, FPSC, IPUC, KPSC, MPSC and NYDPS either are opposed to automatic changes or want the proposal modified because it does not include a provision for state review of GAAP changes. These parties feel that the state commission should have the option of adopting a GAAP change only after considering all aspects of the change including its impact on the cost of service and the economic effects of regulation.

28. GTE and NYDPS object to the 90 day (60 day veto period, 30 day pre-implementation period) review period proposed in the NPRM. GTE believes that the 30 day pre-implementation period should be dropped because it may not be appropriate in all circumstances. NYDPS, on the other hand, favors a 180 day review period to provide parties more time to analyze the effects of a change.

29. BellSouth, OTCs and SNET oppose prior review of GAAP changes by the Commission opting instead for automatic adoption as the TIAG Report recommends. The OTCs and SNET argue that the Commission's proposal is impracticable and burdensome and would result in the USOA never being brought into conformance with GAAP. The OTCs also say that it is self-defeating to adopt GAAP and then turn around and ignore future changes either totally or on an individual carrier basis. BellSouth argues that the regulatory process should not extend the accounting system lead time needed to implement changes to GAAP.

30. Several respondents also recommend, regardless of the FCC prior review issue, that the Commission's implementation date coincide with the FASB effective date of the GAAP change. Arthur Andersen, BellSouth, GTE and OTCs state that the FASB provides enough lead time before implementing a change for the Commission to evaluate its effects prior to its being made effective.

31. OCA-PA, while opposing automatic adoption of GAAP changes, states that if the Commission approves this proposal it should reaffirm the concept that USOA provisions do not bind state regulators in the rate setting process.

32. In their reply comments, Ameritech, BellSouth, OTCs and SNET support the views of those respondents favoring automatic adoption of GAAP changes without prior review by the Commis-

sion. The OTCs do observe that, contrary to the NPRM and IPUC's assertion, automatic adoption of GAAP changes does not delegate regulatory authority to some other entity but merely removes the administrative burden of a formal or informal proceeding on each GAAP change. In addition, the OTCs state that a 60 day review period would be acceptable if the period began on the date the FASB issues a new pronouncement.

33. Finally, AT&T restates its comment position that interexchange carriers should be permitted to implement GAAP changes automatically at the end of the 90 day review period regardless of the impact on revenue requirements.

Materiality.

34. The NPRM proposed to reserve the Commission's right to determine materiality rather than relying on the GAAP definition of materiality. GAAP defines materiality as "the magnitude of an omission or misstatement of accounting information that, in light of surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatement". Three respondents, namely FPSC, GTE and MPSC, support the NPRM proposal which would add provisions in the new USOA so that when circumstances indicate that a GAAP-related accounting decision may have unanticipated ratemaking implications, the accounting would be referred to the Commission for its scrutiny. GTE states that FCC oversight would facilitate the goal of consistent application of GAAP. FPSC and MPSC favor this approach because no general standard on materiality can take into account all situations and materiality judgments can only be made after reviewing all the relevant facts.

35. The majority of parties, however, oppose the NPRM in this area insofar as it would eliminate the GAAP definition of materiality. AT&T, Contel, OTCs, USTA and UTS state that materiality cannot be defined more objectively than it is in the current GAAP definition because it is situation specific and therefore cannot be quantified. BellSouth, OCA-PA, OTCs and SNET also argue that it is contradictory to revise the USOA to conform to GAAP and then drop one of its most important concepts. Furthermore, BellSouth and the OTCs contend that the Commission's proposal is impractical and would usurp management's authority since virtually any accounting decision can have ratemaking implications, and therefore, all decisions would be subject to FCC review.

36. In its comments, Arthur Andersen states that the Commission should try to define materiality but, instead, should establish a materiality threshold such as a percent of total revenues or a dollar limit.

37. Finally, CPUC favors the SEC's policy statement on materiality[7] which focuses on internal control systems as being the definition the Commission should adopt in the new USOA. CPUC feels that this definition will capture an item that is not material under the GAAP definition but would be material under the SEC definition because it may be of significant public concern.

38. In their reply comments, Ameritech, BellSouth, OTCs and SNET state that the Commission should not eliminate the concept of materiality but, instead, should adopt the GAAP definition of materiality. BellSouth, OTCs and SNET contend that the Commission has received no support in the comments to deviate from the GAAP definition.

Jurisdictional Differences.

39. The majority of respondents favor the establishment of accounts to record the effects arising from differing accounting and ratemaking practices adopted by various regulatory authorities. MPSC and NYDPS believe that the jurisdictional accounts will provide useful information as to revenue requirement impacts of deviations in accounting and ratemaking practices adopted by various regulatory authorities. MPSC, NYDPS and AT&T observe that the implementation costs of the jurisdictional accounts should be minimal since carriers currently maintain side records for jurisdictional ratemaking differences. CPUC concurs with the

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[7] The SEC statement reads, in part:

> Materiality, while appropriate as a threshold standard to determine the necessity for disclosure to investors, is totally inadequate as a standard for an internal control system. It is too narrow — and thus too insensitive — an index. For a particular expenditure to be material in the context of a public corporation's financial statements--and therefore in the context of the size of the company — it would need to be, in many instances, in the millions of dollars. Such a threshold, of course, would not be a realistic standard. Procedures designed only to uncover deficiencies in amounts material for financial statement purposes would be useless for internal control purposes. Systems which tolerated omissions or errors of many thousands or even millions of dollars would not represent, by any accepted standard, adequate records and controls. The off-book expenditures, slush funds, and questionable payments that alarmed the public and caused Congress to act, it should be remembered, were in most instances of far lesser magnitude than that which would constitute financial statement materiality. . . .

proposal but states that any attempt at coordinating accounting between jurisdictions would end up a waste of time and effort. Finally, BellSouth, while favoring jurisdictional accounts, suggests a different approach in this area. Under the BellSouth proposal, all transactions would initially be recorded pursuant to GAAP absent regulation. Thereafter, any deviations from non-regulated GAAP mandated by Federal or state regulatory authorities would be recorded in six jurisdictional accounts (3 Federal and 3 state). BellSouth feels that its proposal allows the FCC to monitor its own as well as all state deviations from GAAP and maintains that the annual report each regulatory agency receives will show the impact on both present and future customers. In addition, it will facilitate the elimination of side records and full consideration can be given to the public interest in the ratemaking process.

40. Contel, GTE, USTA and UTS are opposed to the establishment of jurisdictional accounts in the revised USOA. Contel and USTA contend that the proposal would add additional recordkeeping burdens to the carriers and that the data generated is of questionable value and serves no regulatory purpose. UTS states that jurisdictional differences do not belong in the books of account but instead in the external financial statements per FASB 71. GTE, on the other hand, favors standardized accounting and ratemaking practices in all jurisdictions (both Federal and state) rather than the jurisdictional accounts proposed. GTE feels that standardization would reduce administrative costs, would provide a better audit trail and would facilitate the execution of the Commission's public interest responsibilities. Finally, GTE states that it can live with the jurisdictional accounts on a short term basis until standardization is achieved through the adoption of the revised USOA in all regulatory jurisdictions.

41. In their reply comments, the OTCs and SNET support the establishment of jurisdictional accounts in the revised USOA. Contrary to the suggestion of Contel, USTA and UTS that the accounts are not needed, the OTCs believe that the accounts will encourage the movement toward standardized accounting and ratemaking in all jurisdictions. Ameritech and the OTCs in their reply comments also agree with GTE's position that jurisdictional accounts should be adopted only as an interim measure until the USOA is adopted by all jurisdictions. BellSouth in its reply comments restates its support for 6 rather than 3 jurisdictional accounts with all transactions being recorded at their origin

according to GAAP absent regulation.

Nonregulated Activities

42. The NPRM addressed the question of how accounting principles should be applied to nonregulated activities but stated a tentative view that accounting principles applied to nonregulated activities are within the purview of management discretion as long as they do not or will not affect rates. The majority of respondents feel that nonregulated activities are solely within the purview of management and therefore should not be subject to the USOA. MPSC and OCA-PA, however, believe that the USOA should be applied to all activities whether they are regulated or not. MPSC states that applying the requirements of the USOA to a carrier's nonregulated activities will provide comparable financial information and will prevent the regulated activity from subsidizing the nonregulated activity. OCA-PA argues that regulators need not only specification of the accounting provisions for nonregulated activities but also a clear demarcation between the regulated and nonregulated entities. In addition, OCA-PA maintains that common financing of regulated and nonregulated activities ties the operations together regardless of the nature of the business. Finally, FPSC states that accounting for nonregulated activities should be left to the various individual regulatory bodies.

43. In their reply comments, Ameritech, BellSouth, OTCs and SNET state that accounting for nonregulated activities should be left to the purview of management. Ameritech also maintains that the state concerns about cross-subsidization are unfounded since the FCC's authority over accounting for regulated activities is sufficient to prevent unpermitted cross-subsidization.

Interest During Construction.

44. The NPRM proposed the capitalization of imputed interest on equity funds, in addition to interest on debt as is currently allowed by the Commission's rules, but requested parties to comment on the possibility of capitalizing interest during construction based only on the debt component, in accordance with GAAP.

45. Three respondents, CPUC, KPSC and MPSC favor the current approach to the capitalization of interest during construction. KPSC opposes the GAAP approach because of the material ratemaking impact that would result if interest is capitalized only on debt. It states that the annual increase in rates to customers

served by South Central Bell Telephone Company of Kentucky and General Telephone of Kentucky would be $1.77 and $2.71 per customer, respectively. In support of its position that the current approach should be maintained, MPSC states that the current USOA properly measures the costs of financing construction projects and reflects the regulatory process used in determining the amount to be capitalized. MPSC also maintains that the current approach encourages utilities to employ internally generated funds first before seeking external financing at a higher cost. Finally, MPSC states that the current approach is the only way to remedy the overstatement of interest and the understatement of current net income resulting from the use and recognition of current funds to finance plant which is not yet a part of operations.

46. The majority of respondents support the GAAP approach to capitalizing interest during construction per Statement of Financial Accounting Standards No. 34 "Capitalization of Interest Cost" (FABS 34).[8] GTE states that it sees no reason to revert back under the "FASB 71 umbrella" on this issue. The OTCs, SNET, USTA and UTS, while favoring the application of FASB 34 to interest during construction also, suggest that the Commission include all plant under construction in the rate base. The OTCs and UTS submit that including all plant under construction in the rate base would negate the question of which component to include in the calculation of interest during construction since capitalization would no longer be necessary under the provisions of FASB 34. The OTCs and SNET also state that, absent the inclusion of all plant under construction in the rate base, they could not support the GAAP approach to interest during construction because the opportunity costs of equity capital foregone during construction would no longer be recoverable.

47. In their reply comments, Ameritech, BellSouth, OTCs and SNET support the adoption of FASB 34 and the inclusion of all plant under construction in the rate base. Ameritech states that this will eliminate the need to capitalize interest during construction. Both Ameritech and the OTCs maintain that the inclusion of plant under construction in the rate base will permit the recovery of interest on a current rather than deferred basis. AT&T in its reply comments suggests that interexchange carriers be permitted to adopt FASB 34 immediately and monopoly exchange carriers be permitted to do so when the competitive marketplace dictates

[8] FASB 34 establishes the standards used for capitalizing interest cost in determining the historical cost of acquiring certain assets.

that adoption is appropriate.

Pension Costs

48. The majority of respondents favor the proposal in the NPRM which would require accruals of pension expense which are actuarily determined, even if such amounts are not funded. They observe that most carriers are already in conformance with the GAAP provisions. FPSC and MPSC desire commission authorization before a carrier can record unfunded pension expenses.

49. In their reply comments, BellSouth and the OTCs oppose the FPSC and MPSC recommendation that carriers receive Commission approval prior to booking unfunded pension expenses.

Unusual Items.

50. The objections to this item are based on the provision which would require carriers to submit unusual items for prior review and approval by the Commission before being booked as prior period adjustments or extraordinary items. BellSouth, Contel, OTCs and SNET oppose the prior review provision because of the delays it would cause in the normal accounting process. USTA contends that the provision is regulatory overkill and a waste of Commission resources. UTS, on the other hand, submits that this provision is unduly burdensome and unnecessary since the GAAP guidelines are sufficient.

51. In their reply comments, Ameritech, BellSouth, OTCs and SNET reiterate their opposition to the prior review of unusual items by the Commission. The reasons cited were the same as those given by the parties commenting on this issue.

Contingencies.

52. Eight of the commenters support recognizing contingencies under certain limited conditions prescribed in Statement of Financial Accounting Standards No. 5 "Accounting for Contingencies" (FASB 5). These conditions occur when it is probable that an asset has been impaired or a liability has been incurred and the amounts of the loss can be reasonably estimated. CPSC, MPSC and OCA-PA oppose recognizing contingences under the provisions of FASB 5. CPSC states that recognizing a liability could lead to misunderstanding in rate case costs of service and instead suggests handling contingences in the footnotes to the financial statements. MPSC contends that FASB 71 is more appropriate

than FASB 5 because the regulator may direct a carrier to include the contingency in allowable costs for ratemaking purposes even if it does not meet the criteria for recognition under FASB 5. OCA-PA argues that GAAP does not necessarily reflect the operating realities present for rate setting.

53. In their reply comments, Ameritech, BellSouth, OTCs and SNET support recognizing contingencies according to the provisions of FASB 5. Both Ameritech and the OTCs disagree with CPUC's position that contingencies should only be disclosed in the footnotes to the financial statements. Ameritech states that failure to recognize those contingencies deemed material by FASB 5 would most likely result in distortions in rate case results. The OTCs submit that contingent liabilities are current costs of operation, and therefore, should be recognized in financial reports as well as ratemaking. To counter MPSC's suggestion that FASB 71 is more appropriate than FASB 5, the OTCs state that contingent liabilities imposed by regulators would be recognized under FASB 5.

Normalization Accounting.

54. Nine respondents favor the adoption of normalized accounting for all tax timing differences (see paragraphs 100-106, *infra*, for a discussion of the normalization method versus the flow through method). BellSouth, GTE, OTCs and SNET, while favoring normalization, do object to the use of the net of tax method of applying interperiod tax allocation. Specifically, these parties disagree with the relocation of deferred taxes associated with book-tax timing differences to the plant investment series of accounts (net of tax method) for presentational purposes because in their view, this treatment is not prescribed under GAAP in APB 11.[9] Instead, these parties support the "deferral method" which is the prescribed method under GAAP and which would reflect the deferred tax amounts as a deferred credit on the balance sheet. The OTCs contend that the net of tax method distorts the measurement of assets and liabilities. BellSouth argues that the net of tax method oversimplifies the relationship between depreciation, taxes and the valuation of assets and will result in financial statements that are less comparable to nonregulated entities. In support of the deferral method, the OTCs state that it provides comparability among public companies.

[9] APB 11, "Accounting for Income Taxes" was promulgated by the Accounting Principles Board, a predecessor to the Financial Accounting Standards Board.

55. BellSouth, GTE, OTCs, USTA and UTS suggest that if normalization is adopted it be applied on a prospective basis. The OTCs feel that prospective application will help alleviate the revenue requirement impact effect in the early years of adoption. Along with the prospective application of normalization, BellSouth, GTE and UTS suggest keeping embedded deferred taxes under the flow through method until the deferral reverses itself. BellSouth states that this will insure proper reimbursement of tax expense through the ratemaking process. AT&T supports prospective application of normalization for interexchange carriers for both accounting and ratemaking purposes, with embedded deferred amounts phased in and recognized in the revenue requirements over a 5 year transition period.

56. Finally, FPSC, while favoring normalization, argues that state regulators should be given the discretion to handle the matter consistent with their established policy. Several states are opposed to the adoption of normalized accounting for all tax timing differences. IPUC, KPSC and OCA-PA object to normalization on the basis that its adoption would increase revenue requirements. CPUC favors the flow through method of accounting for taxes and along with MPSC believes that adoption should be optional and left to the discretion of the individual states. NYDPS, on the other hand, argues that there is no need to provide regulated firms with the additional cash flow benefits of normalization. NYDPS also states that the Commission should defer action on this issue since the FASB has the area under consideration and may well promulgate new standards on the allocation of taxes. NYDPS further states that if normalization is adopted, it should be phased in over a five year transition period.

57. In their reply comments, AT&T, Ameritech, BellSouth, OTCs and SNET restate support for the adoption of normalized accounting for all tax timing differences. Ameritech agrees with he comments of BellSouth that normalization will result in a nore thorough and consistent matching of revenues and expenses nd, thus, facilitates the proper assignment of costs to cost-ausing customers. Ameritech also states that normalization will esult in improved debt coverage, improved quantity of reported arnings, improved cash flow and lower costs of financing. AT&T, ı its reply comments, feels that interexchange carriers should be ermitted to adopt normalization immediately and monopoly xchange carriers should be permitted to do so when the ompetitive environment dictates. AT&T suggests that normaliza-

tion be applied to prospective amounts of taxes with embedded deferred taxes being phased in over a 5 year transition period. The reply comments of Bellsouth and the OTCs recommend that the states' arguments against normalization be rejected on the basis that the states fail to recognize the important aspects regarding normalization as outlined in BellSouth's comments. BellSouth and the OTCs further state that normalization should be adopted on a prospective basis to minimize the revenue requirement impact expected in the early years of transition. Finally, Ameritech, BellSouth, OTCs and SNET recommend that the net of tax method not be adopted since it does not conform with GAAP per APB No. 11.

Capitalized Leases.

58. Eight respondents favor the adoption of accounting for leases in accordance with Statement of Financial Accounting Standards No. 13 "Accounting for Leases" (FASB 13). CPUC, FPSC, MPSC and NYDPS, on the other hand, oppose the capitalization of leases as proposed in the NPRM. CPUC states that leases should be classified per FASB 13 for reporting purposes only and should be treated as an operating lease for ratemaking purposes. MPSC favors the FASB 71 treatment for leases. Under that method the lease payments included in allowable costs are equal to the combined amount of the capitalized leased asset and the interest on the leased obligation over the term of the lease. NYDPS argues that the Commission should adopt capitalization of leases only if the revenue requirement impact studies support the tentative conclusion that such impacts will be minimal. FPSC believes that lease payments should continue to be treated as expense and that if the Commission does allow capitalization it should limit amortization to the rental expense currently allowed in the USOA. Finally, the OTCs, while favoring the adoption of FASB 13 in the revised USOA, claim that there are two errors in the TIAG report. The first is the use of original cost as a valuation amount to record a capital lease. The second is the fact that the proposed USOA does not provide accounts for "lessor accounting" in a capital lease transaction.

59. In their reply comments, Ameritech, AT&T, BellSouth, OTCs and SNET support capitalizing leases per FASB 13. Ameritech, BellSouth and the OTCs oppose CPUC's recommendation to treat all leases as operating leases for ratemaking. They observe that the date submitted with the carrier comments

indicates that the revenue requirement impact of implementing FASB 13 is minimal. Most state regulators agree. The OTCs also restate their comment position that accounts should be established and instructions should be included in the USOA to handle lessor accounting for capital leases.

60. AT&T in its reply comments states that interexchange carriers should be permitted to apply FASB 13 immediately and monopoly exchange carriers should be permitted to do so only when the marketplace is appropriate for adoption.

Compensated Absences.

61. The majority of commenters favor the adoption of GAAP with respect to compensated absences (vacation, sick leave, etc). GAAP requires the recording of a liability associated with such benefits as they are earned rather than expensing them when they are paid. The NPRM also noted that substantially all carriers except AT&T (pre-divestiture) were already consistent with GAAP. However, two commenters, namely KPSC and NYDPS, are opposed to the proposal in the NPRM. KPSC argues against change in this area on the basis that there is too much pressure on local rates at this time to allow AT&T to change its accounting method. NYDPS contends that the initial adjustment necessary to switch to the accrual method would give rise to a substantial revenue requirement increase. NYDPS also states that the GAAP standard for compensated absences is unnecessarily conservative for regulated firms with a long history of institutional existence that can be expected to continue to exist indefinitely in the future. Therefore, NYDPS recommends that AT&T be allowed to continue its current practice in accounting for compensated absences. Finally, if the Commission does adopt GAAP for compensated absences, NYDPS suggests that it be implemented gradually with incremental liabilities being accrued each year and the initial catch-up liability being deferred indefinitely.

62. In their reply comments, Ameritech, AT&T, BellSouth, OTCs and SNET support the adoption of the accrual basis of accounting for compensated absences. BellSouth and the OTCs state that the accrual basis will improve comparability of financial reports and that the revenue requirement impact can be minimized by amortizing the initial adjustment over a 3–5 year period. After the initial amortization period, BellSouth and the OTCs believe the reduction in working capital will reduce revenue

requirements and result in substantial savings. BellSouth and the OTCs also recommend in their reply comments that unamortized amounts of compensated absences be included in the rate base to reflect the cost of compliance.

63. Ameritech, BellSouth and the OTCs in their reply comments oppose the recommendation of NYDPS that the initial catch up adjustment be deferred indefinitely. They maintain that this action would not properly reflect the carriers' costs of operation and would result in an immediate write off of such costs without corresponding revenues.

64. AT&T in its reply comments suggests that interexchange carriers be allowed to apply GAAP to compensated absences immediately and monopoly exchange carriers be allowed to do so only when the marketplace dictates that adoption is appropriate.

Implementation

65. One other issue was raised in the comments. AT&T and Arthur Andersen both state that the adoption of GAAP into the USOA should take effect as soon as possible rather than when the other revisions of the USOA are effective as proposed in the NPRM. AT&T and Arthur Andersen believe that Part 31 will require only modest changes to accommodate GAAP and that delays in implementation would serve only to delay the recovery of costs for ratemaking purposes.

V. DISCUSSION

Adoption of GAAP and Reliance on FASB 71.

66. We proposed that the revised USOA embrace the concept of GAAP as a whole but that added emphasis be brought to bear on the question of the economic effects of regulation. In addition, we requested parties to comment on the amount of consideration that FASB 71 should receive in the revised USOA. Only one party objected to incorporating GAAP into the revised USOA. The remaining comments were divided, however, as to the extent to which FASB 71 should be relied on in the revised USOA.

67. We do not agree with OCA-PA that the current USOA has worked well or that this proceeding does not satisfy any of the seven functions that the original NPRM sought to address. The July 1978 Notice in CC Docket 78-196 recognized that the current USOA does not respond to the current technological environment. While this proceeding alone does not satisfy the

seven original functions stated in CC Docket 78-196, its adoption, along with the revised USOA, and other proceedings emanating from CC Docket 78-196 will satisfy those seven functions (NPRM at p.2).

68. We also do not agree with the states' position that the revised USOA should rely heavily on FASB 71. We are not persuaded by the arguments presented that FASB 71 will present the actual ratemaking practices under which companies operate, or that it provides regulatory authorities with the option of deciding on a case by case basis what accounting treatment is appropriate. In our opinion, FASB 71 is mainly a reporting convention that becomes relevant only after the regulator has directed a regulated company to account for an item differently than GAAP. Consequently, if regulators prescribe accounting standards that differ from the GAAP standards and the conditions of probable recovery are met, FASB 71 would permit carriers to include the deviation in its published financial statements. As we see it, FASB 71 requires carriers to modify published financial statements to agree with accounting required by regulators. We do not see it as having a bearing or driving regulators to rely on FASB 71, nor do we see it as having an effect on the FCC's accounting system.

69. We also do not agree with AT&T's position that GAAP should be adopted immediately by interexchange carriers and by exchange carriers only when the marketplace dictates (especially with respect to the recommendations having significant revenue requirement impacts).[10] This would promote inconsistent treatment among carriers, as the OTCs note, and would also present comparability problems with respect to those carriers having both exchange and interexchange operations. In effect, these carriers could apply GAAP with respect to their interexchange operations and not apply GAAP to their exchange operations. To promote the needed consistency and uniformity industrywide to properly carryout our regulatory responsibilities, we are applying the same accounting standards to all carriers.

70. We are adopting GAAP into the revised USOA for accounting purposes to the extent regulatory considerations permit. The ratemaking status of the changes in accounting will be determined in subsequent rate cases. In addition, in order to maintain control over the USOA so that uniformity is maintained for all carriers,

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[10] This comment of AT&T cuts across the various issues discussed individually in this order. To the extent that it does, it will not be addressed further in connection with our separate consideration of each issue.

the Commission will select the accounting method carriers are to use under GAAP when GAAP permits several accounting options. The carriers will use the accounting method selected by the Commission unless we grant them a waiver to do otherwise.

Automatic Adoption of Future GAAP Changes.

71. In our NPRM we proposed to allow carriers to implement changes to GAAP automatically after 90 days (60 day veto period, 30 day pre-implementation period) provided that (1) carriers notified the Commission of their intention to implement the change along with an analysis of its ratemaking impact and (2) the FCC did not stay implementation of the change pending further proceedings. Several parties want that proposal modified to include a provision for state review of GAAP changes. In addition, several parties oppose the prior review provisions (NPRM at p. 6).

72. We do not agree with those parties who want a provision for state review of GAAP changes added to the revised USOA. While the states have every right to review GAAP changes and to decide whether or not to implement them, we do not feel that their approval should be written into our accounting system. Furthermore, to alleviate the concerns of the states, we will add a provision in the revised USOA which will state that our accounting rules and approval of GAAP changes will not necessarily be binding on the ratemaking practices of the states.

73. While several parties oppose prior Commission review of future GAAP changes, we do not feel that this requirement is unduly burdensome. We are on record in this proceeding as supporting GAAP and its concepts and we will continue this policy with respect to future changes in GAAP. Thus, we are essentially stating that we will adopt all future changes in GAAP unless the revenue requirement study that the carriers file with the Commission shows that the change will have a significant impact on revenue requirements. In our opinion, the vast majority of future changes in GAAP will be adopted under this modified automatic adoption plan without Commission interference.

74. To facilitate automatic adoption, we are modifying the proposal in the NPRM so that carriers can adopt changes to GAAP automatically after ninety days unless the Commission notifies the carrier to the contrary. This does not, however, alter the proposal in the NPRM that the carrier must notify us of its intention to adopt the change and that a revenue requirement

study must also accompany the notification.

Materiality.

75. In our NPRM we proposed to add provisions in the revised USOA requiring that a GAAP-related accounting decision that may have unanticipated ratemaking implications be referred to the Commission for its scrutiny. Several commenters objected to adding this provision on the basis that the GAAP definition of materiality was sufficient and that materiality cannot be more objectively defined than it is under GAAP. Several respondents also stated that the Commission's proposal would usurp management's authority and that it is contradictory to adopt GAAP and then drop one of its most important underpinnings.

76. As we stated in the NPRM, the GAAP definition of materiality leaves too much to the discretion of parties not bound by our public interest responsibilities to be viable in a regulatory accounting scheme. The comments received have not persuaded us to change our position that we need to retain sufficient control over the revised USOA to insure that it functions as a useful regulatory tool. Instead, we agree with GTE that Commission oversight in this area will facilitate the goal of consistent application of GAAP in the revised USOA.

77. We do not believe that scrutinizing accounting decisions with ratemaking implications in the fulfillment of our regulatory responsibilities usurps management's authority nor do we feel that it is contradictory to adopt GAAP and then not rely on the GAAP definition of materiality. The purpose of this proceeding is to implement GAAP to the extent practicable and for the reasons stated earlier we do not believe that the GAAP definition of materiality meets our regulatory needs.

78. We also do not agree with CPUC that the SEC definition of materiality should be adopted in the revised USOA. This statement was designed for internal control systems, and, while it is more discretionary than the GAAP definition of materiality, it may not meet our regulatory needs in every case. Therefore, we are not adopting it in the revised USOA.

79. Arthur Andersen stated that the Commission should not try to define materiality but, instead, should establish a materiality threshold. Arthur Andersen suggested materiality thresholds such as an item's relation to the revenues of a company or a specific dollar limit amount. We do not agree with Arthur Andersen's suggestion that a materiality threshold should be

established in the revised USOA. Thresholds do not lend themselves to the differing sizes of the companies that will be subject to Part 32.

80. We do, however, agree with Arthur Andersen's belief that the Commission should not try to define materiality. We have decided that the ratemaking considerations the Commission faces demand that the USOA require more specificity in the materiality area than what is provided under GAAP. While the USOA will not define materiality, this demand for greater specificity will be met by the fact that the system being designed is a detailed accounting system. Carriers in following the accounting system will not be able to deviate from its requirements without express approval under waiver provisions regardless of an item's materiality. Moreover, we will continue to examine such items as extraordinary items, unusual items and prior period adjustments on a case by case basis, irrespective of materiality, to determine whether they should be classified as above or below the line items.

Jurisdictional Differences.

81. We proposed to establish accounts to record the effects arising from differing accounting and ratemaking practices adopted by various regulatory authorities. While the majority of comments were received were in favor of establishing jurisdictional accounts, several parties were opposed to their inclusion in the revised USOA.

82. Several comments in opposition to the jurisdictional accounts contend that the proposed accounts are burdensome or of questionable value. Several other respondents observe that the implementation costs of jurisdictional accounts are minimal since carriers already maintain side records for jurisdictional ratemaking differences.

83. BellSouth proposes to record all transactions initially pursuant to GAAP, with any deviations from GAAP mandated by Federal or state regulatory authorities being recorded in jurisdictional accounts (3 Federal and 3 State.) We see no need to adopt the BellSouth proposal which would add 3 jurisdictional accounts to record federally mandated deviations from GAAP. We are already aware of the USOA requirements that will diverge from GAAP, and we see no usefulness in monitoring our own actions. Accordingly, we will incorporate only 3 jurisdictional accounts in

the USOA emanating from CC Docket 78-196.

84. With respect to the usefulness of the proposed accounts, we agree with MPSC and NYDPS that the jurisdictional accounts will provide useful information as to revenue requirement impacts of deviations adopted by various regulatory authorities. Moreover, we feel that the data will provide a barometer which shows the impact of varying state ratemaking practices and that the accounts will be helpful in monitoring separations practices.

85. Several parties support GTE's suggestion that we establish jurisdictional accounts on an interim basis until the USOA is adopted by all jurisdictions. Although we hope that all jurisdictions will adopt the same accounting standards, we recognize that the probability of this occurring is very slim. If this were to occur, however, we would eliminate the jurisdictional accounts from the USOA as they would no longer be necessary.

Nonregulated Activities.

86. In our NPRM we stated our belief that accounting for nonregulated activities is solely within the purview of carrier management as long as those decisions do not affect future regulatory decisions. We did, however, request parties which considered rules in this area to be necessary to specify the rules desired and the criteria needed to implement them.

87. MPSC and OCA-PA stated that the USOA should be applied to all carrier activities because the operation of regulated and nonregulated functions can be intertwined and thus lead to cross-subsidization.

88. We have not been persuaded to change our view that accounting for nonregulated activities is within the purview of carrier management. As long as the carriers account for nonregulated activities in accordance with the policy set forth in the *Fifth Report and Order* in CC Docket 81-893, FCC 84-547 (released November 20, 1984), and in the Computer II Inquiry,[11] we feel that the transactions of the nonregulated activities to be recorded in a separate set of books can be left to management prerogative. We agree with Ameritech that MPSC's and OCA-PA's concerns about cross-subsidization are unfounded since our authority over accounting for the regulated side of the

[11] Second Computer Inquiry (Computer II), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 5 (1981), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

carriers should be sufficient to prevent unpermitted cross-subsidization.

89. With respect to FPSC's belief that accounting for nonregulated activities should be left to the various individual regulatory bodies, we do not agree. The FCC has already addressed accounting for nonregulated activities in the *Fifth Report and Order, supra.* We believe this accounting treatment is working and, thus, we are not going to change it without evidence to the contrary.

Interest During Construction.

90. NPRM proposed to keep the current practice of capitalizing imputed interest on equity funds, in addition to interest on debt, but requested comments on the possibility of capitalizing interes during construction on the debt component only in accorda with GAAP. Several parties, mainly carriers, filed comme supporting the GAAP approach to capitalizing interest dur construction. The majority of these parties also suggested t the Commission should include all plant under construction in rate base along with allowing interset to be capitalized i accordance with GAAP.

91. While the revenue requirement impact studies submitted by AT&T, BellSouth and UTS show the impact of capitalizing interest during construction in accordance with GAAP to be immaterial, we have nonetheless decided to keep the current practice of capitalizing interest during construction on both debt and equity funds. While this practice does diverge from GAAP, we believe that it is a very minor divergence.

92. We will not allow carriers to include all plant unde construction in the rate base, as some parties suggest (se paragraph 46, *supra*), since this would result in the ratepayer paying for construction projects prior to receiving any benefit from them through improved services.

Pension Costs.

93. We do not agree with FPSC's and MPSC's view that carriers should receive Commission approval prior to booking unfunded pension expenses which are actuarily determined. As the comments and reply comments note, most carriers are already accruing unfunded pension costs in accordance with GAAP, and no party has provided any information to suggest that this practice will have an effect on revenue requirements. Therefore, we see no need to review the pension costs being booked by carriers in accordance with GAAP, and we will allow carriers to

book unfunded pension expenses which are actuarily determined in the revised USOA.

Unusual Items.

94. Several parties suggested that the Commission not require carriers to submit unusual items for prior review and approval. These parties believe that the GAAP guidelines are sufficient and that the prior review provision would be burdensome and would disrupt the normal accounting process.

95. While we agree that the GAAP guidelines are specific as to what constitutes prior period adjustments and extraordinary items, we still feel that these items should be submitted to the Commission for review and approval. As the NPRM notes, these transactions by definition are significant and out of the ordinary and thus should be examined. By receiving notification of these transactions we can carry out our regulatory oversight responsibilities to insure that allowable costs are recovered by the carriers and gains and other credits are given to the ratepayer. Finally, we do not believe that it is unduly burdensome nor would it disrupt the accounting process to provide us with the opportunity to review unusual items since carriers currently do this under Part 31.

Contingencies.

96. We proposed to follow GAAP with respect to recognizing contingent liabilities (see paragraph 52, *supra*) in the revised USOA. Eight respondents favored recognizing contingent liabilities pursuant to GAAP. Three states, however, are opposed to this proposal. Their opposition is based on their belief that GAAP does not reflect the operating realities of ratemaking and recognizing contingent liabilities could lead to misunderstandings in rate cases.

97. We do not agree with the states that recognizing contingent liabilities would lead to misunderstandings in rate cases or would ignore the realities of ratemaking. We feel that GAAP is specific in this area and its guidelines essentially equate to the logical recognition of liabilities.

98. CPUC expressed the view that contingenices should only be disclosed in the footnotes to the financial statements. We believe, as Ameritech states, that failure to recognize contingencies per FASB 5 would most likely result in distortions in rate case results and, as the OTCs submit, that contingent liabilities are

current costs of operation and, therefore, should be recognized as a liability in the financial statements.

99. Finally, we do not feel that FASB 71 is more appropriate than FASB 5 as MPSC suggests. We agree that the OTCs that FASB 5 would recognize as a contingent liability any contingent liabilities imposed by the regulator in ratemaking cases.

Normalization Accounting.

100. The NPRM proposed to permit normalization accounting for all tax timing differences. In the NPRM special emphasis was placed on interest during construction, pensions and other tax charges capitalized for book purposes but expensed for tax payment purposes. Generally speaking, the normalization of taxes relates the effect of these differences to the periods the capitalized amounts remain on the books of account. The benefits of lower taxes during the year in which amounts are capitalized for book purposes and deducted on tax returns for tax payment purposes are spread over succeeding periods. Under our current rules, tax benefits related to these transactions are "flowed-through" to current ratepayers. The actual tax liability for these itmes are recorded as an expense and ratepayers of succeeding periods receive no benefit.

101. The normalization of taxes related to those items in the NPRM would result in a higher book tax expense in the year the difference arises and lower book tax expenses in succeeding periods (as the taxes relate to the same items). In the first year, the additional amount would produce a deferred income tax credit which would be reduced over the period the capitalized amounts remain on the books. Since deferred income tax balances are deducted from the rate base in calculating allowable rates of return, ratepayers also derive some benefit from the calculation of the allowable rate of return using the reduced rate base. The TIAG group's analysis placed the first year additional revenue requirement at $690 million, with subsequent years requirements reducing to zero over a twelve year period (NPRM at p.12). Beyond that point, ratepayers would be paying less because the rate impact of the accumulated deferred income tax balances (which are deducted from the rate base) will exceed additional tax effects of taxes normalized during the twelfth and succeeding years.

102. Several states are opposed to allowing normalization accounting because of its effects on revenue requirements. Several other respondents, while favoring normalization, suggest that it be applied only to prospective amounts, with the embedded amounts remaining under the "flow-through" method.

103. We have examined data submitted with the comments and reply comments and concluded that the additional revenue requirements of full normalization are too high. We have not ignored, however, the fact that normalization is already in place for depreciation and that waivers have been granted on a case by case basis for other types of timing differences. We are also aware of the inconsistency in practicing normalization for some timing differences but not others and the fact that we are here addressing the last significant portion of the normalization issue. Nor are we unaware of the long-term benefits of normalization and the advantages from an accounting standpoint of making reported industry financial statements more consistent with the unregulated American business community. While we have decided that full implementation costs are too high, we have not decided to reject ultimate full normalization. We have explored alternative methods for phasing-in normalization in those areas proposed in the NPRM.

104. After reviewing the record, we have decided to phase-in tax normalization for the tax effects of different book and tax treatment of capitalized interest during construction, pensions, and tax charges of all other material timing differences.[12] Under the methodology we have chosen, the carriers would normalize 20 percent of the amount that would ordinarily have been flowed-through in the initial year. An equal amount would be recorded as a deferred tax credit.[13] In the initial year, the 20 percent normalization would create an additional revenue requirement. In subsequent years, the deferred tax credit would be reduced and book tax expense would be lower than under the flow-through method. In succeeding years, carriers could normalize an additional 20 percent each year (40 percent in year 2, 60 percent in year 3, and so on) until at the end of the fifth year full

[12] The methodology discussed in paragraph 104 would not affect depreciation or other items the tax consequences of which have already been normalized pursuant to rule or waiver.

[13] We recognize that some timing differences will result in deferred charges but for ease of illustration we have outlined the methodology as it relates to deferred credits, which we expect to be prevalent.

normalization would occur.

105. We believe the foregoing methodology would smooth somewhat the additional revenue requirements of normalization[14] and meets the tests of being rational, systematic and equitable. We recognize that the use of a phase-in methodology is not an ideal resolution, but it does balance our concern for ratepayers against our desire to move the accounting policies we prescribe for telephone companies closer to the conventional practices of the rest of the American business community.

106. Finally, in dealing with balance sheet presentational aspects, we have tentatively decided to follow the deferral method in applying normalization as prescribed under GAAP rather than the net of tax method which was proposed in the NPRM. The deferral method would show deferred taxes as a deferred credit and the net of tax method would show deferred taxes as a deduction from the related asset. The ultimate decision, however, as to which method we will allow for normalization, will be made in the context of the USOA proceedings in CC Docket 78-196.

Capitalized Leases.

107. In the NPRM we proposed the adoption of GAAP with respect to the capitalization of certain leases which generally speaking, convey ownership type beneifts and risks to the lessee. Several states were opposed to the capitalization of leases (paragraph 58, *supra*) suggesting different treatment for ratemaking purposes, i.e.; continued treatment as non-capitalized operating leases and recognition of rental expense only. The revenue impact data provided in the comments have led us to the conclusion that there will be no significant revenue requirement increases as a result of capitalizing certain leases per FASB 13 "Accounting for Leases". Moreover, we are of the opinion that FASB 13 presents leases in the proper light, whereby the carriers recognize the liability they have incurred through the establishment of a long-term lease, as well as the fact that the lease asset becomes an asset in the provision of telecommunications services. We will therefore, incorporate the FASB 13 treatment of capital leases as they pertain to lessees in the new USOA proposed in CC Docket 78-196. There will of course be some consideration for

[14] We also recognize that the amounts to be normalized would be affected by decisions yet to be made in CC Docket 78-196 with respect to the capitalization vs. expensing of certain plant costs. These matters will be addressed in the Final Report and Order in that docket.

regulatory consistency in two areas.

108. In the first area, where the OTCs pointed out that the original cost consideration in the TIAG report was not one of the valuation considerations for capital leases in FASB 13, we have decided to retain the original cost consideration in order to preclude double recovery for the same asset. This could occur, when items are transferred between telephone companies and recorded at fair value which exceeds original cost. We expect, however, that in most instances, fair value will equate with original cost.

109. In the area of lessor accounting, the OTCs point out that the NPRM was silent and that the new USOA should provide corollary treatment for lessor accounting. We do not believe this is a problem area because our rules (current and now under development) that require distinctions between regulated and nonregulated activities will be the prevailing consideration in lessor accounting, and to the extent that carriers are engaged in leasing activities, much of their activity will be accounted for as nonregulated — which essentially means that lessors would be able to follow GAAP. This is a matter, however, that will be addressed in the final rule emanating from CC Docket 78-196.

Compensated Absences.

110. In the NPRM we proposed to require the accrual of compensated absences in the year in which they are earned and to implement deferred amounts over a representative number of years. Two respondents, however, were opposed to the proposal in the NPRM.

111. We do not agree with NYDPS' position that the GAAP standard is too conservative for regulated firms which can be expected to continue to exist in the future and, therefore, do not need to accrue compensated absences. We are of the opinion that accruing compensated absences in the year in which they are earned is the proper method of accounting in that it recognizes that a liability has been incurred by the carrier to provide compensation to its employees at some future date.

112. After reviewing the revenue requirement impact study submitted by AT&T, we agree with NYDPS and KPSC that the change to the accrual method would have a substantial revenue requirement impact, mainly because of the catch-up entry that must be made to recognize the liability for compensated absences which exists but is not yet recorded on the carrier's books. TIAG

estimated the additional revenue requirement for the catch-up year to be $1.7 billion (NPRM at p. 14). We do not favor NYDPS' suggestion that the catch-up entry be deferred indefinitely. Instead, we agree with the positions of AT&T, BellSouth and the OTCs that the catch-up entry should be amortized ratably over a specified number of years to minimize the impact on revenue requirements. We believe that the phase-in period proposed by the above carriers of from 3-5 years increases the revenue requirements by far too much. We are adopting a phase-in period of 10 years to amortize the catch-up entry so that the revenue requirement impact is further lessened. We would have carriers book the liability, establish a deferred charge and amortize the deferred charge over 10 years. Current year accruals will be booked to the liability account and charged to the appropriate expense account as employees earn vacations or sick days. This procedure should reduce the impact of the catch-up to 10 percent of the TIAG estimate.[15]

Implementation

113. AT&T and Arthur Andersen believe that GAAP should be incorporated into the USOA as soon as possible rather than when the other revisions of the USOA become effective. They feel that Part 31 will require only modest changes to accommodate GAAP and that delaying implementation only serves to delay recovery of costs for ratemaking purposes.

114. We do not agree that GAAP should be adopted into the USOA prior to the effective date of the USOA rewrite being developed in CC Docket 78-196. We feel that it would be confusing to adopt new requirements and accounts in Part 31 and then have the possibility of completely different accounts being established in the revised USOA.

VI. OTHER MATTERS

115. In compliance with the provisions of Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), we believe the above discussion sets forth the purpose of the proposed amendments. We certify that the Regulatory Flexibility Act is not applicable to the rules in this proceeding. Although some local

[15] A decision as to whether or not to include the unamortized deferred charge balance in the rate base as the OTCs suggest is a rate matter which would be more appropriately handled in a rate proceeding rather than in this rule which is intended to resolve accounting issues.

exchange carriers are very small, local telephone companies do not appear to fall within the Regulatory Flexibility Act's definition of a "small entity." The Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as the definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. The Commission has found all exchange carriers to be dominant in the *Competitive Carrier* proceeding, 85 FCC 1, 23-24 (1980). To the extent that interexchange carriers are affected by these rules, we hereby certify that these rules will not have significant economic effect on a substantial number of small entities.

116. The collection of information requirements contained in this rulemaking have been submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the Paperwork Reduction Act of 1980, 44 U.S.C. § 35. All questions concerning the collection requirements should be directed to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Federal Communications Commission. *See* 5 CFR 1320.13(a).

VII. ORDERING CLAUSES

117. Although we do not intend to revisit these subjects when we issue an opinion adopting a new USOA, we will defer the adoption of the rules that will implement the decisions described in this *Report and Order* until we adopt the rules that are being developed in CC Docket 78-196. The rules that implement this decision will become effective at the time the revised USOA becomes effective.

118. IT IS ORDERED That CC Docket No. 84-469 is hereby terminated.

119. IT IS FURTHER ORDERED That the Secretary shall cause a copy of this Order to be published in the Federal Register.

120. IT IS FURTHER ORDERED That the Secretary shall send a copy of this Order to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appeal, Denied
Application, Dismissal with Prejudice
Failure to Prosecute

Review Board denied appeal from ALJ's order dismissing application from comparative hearing for failure to prosecute. Applicant had not supplied information required by Hearing Designation Order nor responded to motions to dismiss and to enlarge issues directed against it and did not attend prehearing conference. It may not shift responsibility for non-prosection to former counsel.
—*Vela Broadcasting Co.*
MM Docket No. 85-132

FCC 85R-93

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
VELA BROADCASTING CO. *et al.*	MM DOCKET NO. 85-132
For Construction Permit for a New Television Station in San Antonio, Texas	

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1985; Released: November 15, 1985.

BY THE REVIEW BOARD:

1. On September 18, 1985, Salinas-Oatman Corporation filed an appeal from the ruling of presiding Administrative Law Judge Edward J. Kuhlmann (ALJ) dismissing its application (File No. BPCT-841129LF) in this proceeding. See Memorandum Opinion and Order, FCC 85M-2969, released July 29, 1985, at para. 3 (Dismissal Order), *recon. denied*, FCC 85M-3539, released September 11, 1985 (Reconsideration Order). Televista Corporation, a

competing applicant, has opposed the appeal.

2. Previously, by Hearing Designation Order (HDO), 50 Fed. Reg. 21938, published May 29, 1985, the Salinas-Oatman application (and twelve other mutually exclusive television applications) were designated for consolidated hearing on a transmitter site availability issue against it, as well as on the standard comparative issue. The HDO pointed to several serious defects in the Salinas-Oatman application, apart from the failure to demonstrate reasonable assurance of site availability, and afforded Salinas-Oatman 20 days from the release date (*i.e.*, until June 10, 1985) to cure them by amendment. *Id.*, at paras. 10–13, 22–24. These flaws included: (a) Salinas-Oatman had not certified that it was financially qualified but instead had merely indicated that it would do so at some future date; (b) the applicant had provided none of the information required by the application form concerning the qualifications of Ms. Dorothy Ozan, to whom Salinas-Oatman intended to sell an 80% nonvoting corporate interest; and (c) it had failed to submit the data required by the application form regarding the area and population encompassed by its predicted Grade B contour.

3. Salinas-Oatman did not submit any of the information called for by the HDO within the prescribed time. Thereafter, on June 28, 1985, Televista filed a motion to dismiss the Salinas-Oatman application, and Televista and two other parties also filed motions to enlarge issues directed against Salinas-Oatman. See Dismissal Order, at paras. 1, 3. Again, Salinas-Oatman was silent. It did not respond to the dismissal petition or to the enlargement motions, despite having requested and being given additional time to respond. It did not attend the prehearing conference held July 22, 1985, and, on the next day, its counsel filed notice that he was withdrawing. *Id.*, at para. 3 and n. 1; Reconsideration Order, at para 3. Based on these facts, the ALJ concluded that Salinas-Oatman was not prosecuting its application and granted Televista's petition to dismiss that application. Dismissal Order, at para. 3; Reconsideration Order, at paras. 1–3.

4. Subsequently, the ALJ denied Salinas-Oatman's petition for reconsideration and reinstatement of its application, finding insufficient the applicant's claim of ignorance regarding the existence of dismissal and enlargement petitions filed against it and its counsel's non-appearance at the July 22 prehearing conference. Salinas-Oatman asserted that it first became aware of its failures and ommissions on July 27, 1985, when it hired new counsel. In denying reconsideration, the ALJ held that "an

applicant is responsible for its own errors or failure to prosecute and it cannot now claim that its lawyer and engineer were to blame." Reconsideration Order, at para. 4. He also observed that Salinas-Oatman had not explained why its application was incomplete when filed and continued to remain so. He further found it unlikely that the applicant did not have actual knowledge of its various delicts in light of the Commission's practice of directly mailing copies of all orders in a proceeding, including the HDO, to the applicant at the address listed in its application, as well as to its counsel. *Id.*

5. In its appeal, Salinas-Oatman does not take exception to any of the ALJ's factual findings. Instead, as in its reconsideration petition before the ALJ, it faults its former counsel for all of its shortcomings and states that "[i]t would be unnecessary and unfair to continue to bar a willing and interested applicant like Salinas from this proceeding." Appeal, at para. 4. It asserts that if its application were reinstated, it would gladly submit the necessary amendments and pleadings, *id.*, at n. *, and attaches an affidavit of its principal attesting to her lack of knowledge of the petitions filed against Salinas-Oatman and of the prehearing conference it failed to attend.

6. Televista responds that Salinas-Oatman's reliance on counsel is not a valid excuse for failing to prosecute its application and that the applicant's principal "herself was derelict in insuring that her application was being properly prosecuted." Opposition, at para. 5. In support, it submits an affidavit of the applicant's former counsel who states that Salinas-Oatman's allegations are "wrong in material respects." *Id.*, Attachment.[1]

7. We shall deny Salinas-Oatman's appeal. The uncontroverted allegations show that Salinas-Oatman did not supply (nor seek additional time within which to supply) the information called for by the HDO, did not respond to a petition to dismiss its application and motions to enlarge issues against it, and did not appear at a prehearing conference. Its application was dismissed about two months after hearing designation and it therefore had ample opportunity to prosecute its application in the interim but failed to do so. It may not escape the consequences of its

[1] Former counsel has not identified the "material" errors with particularity because, citing the attorney-client privilege, he wishes not to unnecessarily disclose client secrets. Nevertheless, he states that he is "ready to provide written or oral testimony under oath rebutting statements made in the Petition for Reconsideration or Declaration [*i.e.*, affidavit of Salinas-Oatman's principal] promptly upon being directed to do so by the presiding Judge in this proceeding." *Id.*

non-prosecution by shifting responsibility to its former counsel. *Cf. RKO General, Inc.* v. *FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981); *United Broadcasting Company, Inc. (WOOK) (FM)*, 94 FCC 2D 938, 953-955 (Rev. Bd. 1983), *rev'd on other grounds*, 100 FCC 2d 1574, 57 RR 2d 885 (1985), *appeal pending sub. nom. District Broadcasting Co.* vs. *FCC*, No. 85-1081 (D.C. Cir. February 7, 1985). To hold otherwise would create administrative and procedural havoc by either: (a) allowing dismissed applicants to simply incant "counsel is to blame" and thereby automatically achieve reinstatement of their applications, or (b) requiring evaluations of the competence of counsel, thus involving us in "questions of professional competence more properly left to courts and boards of review established for this purpose." *See United Public Broadcasting Co., Inc.*, 57 RR 2d 1605, 1606 (1985).[2] Moreover, in this case, for the reasons given by the ALJ, it is unlikely that Salinas-Oatman did not in actuality know of its application defects and the petitions filed against it; it certainly *should* have known. See Reconsideration Order, at para. 4.[3]

8. ACCORDINGLY, IT IS ORDERED, That the appeal filed September 18, 1985 (and corrected by erratum on September 20, 1985) by Salinas-Oatman Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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[2] Administrative orderliness is especially important in a case like this, involving thirteen applicants, in order to assure that the public receives expeditiously a new broadcast service and that the other applicants suffer neither comparative disadvantage nor, along with the Commission and the public, wasted expenditure of resources.

[3] Under this circumstances, lack of such knowledge implies the likelihood of ineptness on the part of the applicant. Because of the conclusion reached above, however, further inquiry in this area would serve no useful purpose.

Cross Interest
Multiple Ownership
Newspaper Ownership

Application for modification of TV construction permit granted where 90% limited partner of permittee is also owner of daily newspaper in nearby community. Although limited partner could exercise considerable influence in order to protect its investment, specific circumstances of case warrant exception to cross-interest policy.
—*Wisconsin Television, Ltd.*

FCC 85-531

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Wisconsin Television, Ltd. Stevens Point, Wisconsin 54481 For Modification of Construction Permit	IN REPLY REFER TO: 8940-MLB

Adopted: October 2, 1985; Released: October 18, 1985.

Wisconsin Television, Ltd.
3100 Ellis Street
Stevens Point, Wisconsin 54481
Re:
WWTL(TV)
Marshfield, Wisconsin
BMPCT-830823KH

Gentlemen:

This is with respect to your above-captioned application for a modification of your construction permit for unbuilt Station WWTL(TV), Channel 39, Marshfield, Wisconsin.

Specifically, you propose to increase your effective radiated power (ERP), to utilize a different antenna system, and to decrease the height of your antenna above average terrain. The

effect of these changes would be to increase greatly your proposed service area. For example, as presently authorized, the station will place a predicted Grade A contour (74 dBu) over a portion of Stevens Point, Wisconsin, which is 32.5 miles east of Marshfield. Grant of the pending application, however, would result in Stevens Point being entirely encompassed by the station's city grade contour (80 dBu). The Journal Printing Co. (Journal), the permittee's limited partner with a 90% interest, is also the publisher of the *Stevens Point Daily Journal*, a daily newspaper of general circulation in Stevens Point. The question, therefore, arises as to whether Journal's interests in both the newspaper and the permittee would be prohibited by Section 73.3555(c)(3) of the Commission's Rules or by the Commission's cross-interest policy, and you have, accordingly, requested a declaratory ruling or a waiver of the Rule.

At the outset, you argue that the Commission's cross-interest policy applies only where parties are involved in both media interests and that such is not the case here. Rather, you state that control of the permittee lies entirely with Ann Glinski, your general partner with a 10% interest, and that Journal has no authority over the permittee and will have no involvement in the management of the station. Nevertheless, you have sought a waiver of Section 73.3555, in the event the Commission determines that section applicable here. In support of that request, you note that the rule is not predicated on the inherent harmfulness of newspaper-broadcast combinations but, rather, on the premise that a greater good is presumed to result from increased diversity, and you argue that grant of the application would only serve to increase that diversity. In this respect, you indicate that grant of your proposal would provide a larger number of viewers with an improved signal and higher quality programming than would be possible with your authorized facilities. Specifically, you note that service would be significantly improved to four Wisconsin communities: Wausau (population 32,460), Stevens Point (population 22,970), Wisconsin Rapids (population 17,995), and Merrill (population 9,578). Further, because your application for modification of your construction permit is unopposed, you argue that it is unlikely that a future applicant will seek to provide additional service to those areas.

Despite the fact that grant of your application would improve your signal in Stevens Point, you contend that the impact on that community would actually be minimal. First, you note that you are already authorized to place a viewable signal there and that it

would, in any case, be available on the Stevens Point cable television system. You further argue that Marshfield and Stevens Point are discrete communities with the *Stevens Point Daily Journal* and the *Marshfield News-Herald* having only negligible circulation in the other community. Only 12 of the *Daily Journal's*, 13,800 subscriptions (0.086%) are received in Marshfield, and the *News-Herald* circulation in Stevens Point is likewise under one percent of its 15,238 subscribers. The *Daily Journal*, you maintain, depends primarily on advertising revenues from Stevens Point itself, whereas your television station would rely on Marshfield and regional advertising. You conclude, therefore, that your television station and the *Daily Journal* will not be competing for the same advertising dollars. Finally, you argue that there is a multiplicity of broadcast signals that are already received in Stevens Point, as well as a cable television system and the daily newspaper. Accordingly, you conclude that the upgrading of your signal would have little impact there.

You further maintain that grant of the application would help assure the economic viability of the station, since the number of viewers covered by the existing authorization would provide too narrow a market base to provide quality programming. In this regard, you contend that, with your present facilities, most prospective advertisers would insist on very low rates compared to what they would be willing to pay the other three commercial television stations whose signals are received in Marshfield and whose coverage areas are much larger than yours.

Section 73.3555(c)(3) proscribes a party from directly or indirectly owning, operating, or controlling a television station and a daily newspaper, where the station's predicted Grade A contour encompasses the entire community in which the newspaper is published. Note 2(g)(1) to the Rule states, however, that limited partnership interests are not attributable if the applicant certifies that the limited partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership. An examination of your limited partnership agreement reveals that the Journal is expressly proscribed from having any voice in the affairs of the partnership or in the management and operation of the station. Moreover, the Journal may not incur any expenditures on behalf of the partnership, nor may it act as its agent, and its liability is limited to those contributions it has agreed to make. It, therefore, appears that control of the partnership and management of the station lie solely with Ms. Glinski. We have also reviewed the

partnership agreement in light of our recent decision in *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 R.R. 2d 604 (1985). Our own analysis of the partnership agreement confirms that all relevant restrictions have been satisfied. Consequently, the Journal's interest in the station is nonattributable, and we find no violation of our multiple ownership rules. We now turn to the cross-interest considerations insofar as that policy applies to Stevens Point.

The cross-interest policy stems from the prohibitions on common ownership and control contained in our multiple ownership rule. The policy is grounded in our concern over "the potential for conflict of interest, unfair competition, and detriment to the public interest" which may result from certain types of business relationships, not expressly covered by the terms of the multiple ownership rule. *Eastern Broadcasting Corp.*, 30 F.C.C. 2d 745, 755 (Rev. Bd. 1971). These concerns could be raised, for example, if the owner of one television station in a community sought to acquire a substantial insulated limited partnership interest in another television station there. Such interests are generally exempted from the effects and implications of our attribution rules. *See, Multiple Ownership Rules (Attribution of Ownership Interests)*, 97 F.C.C. 2d 997, 1022 (1984). To allow one entity to exercise a significant role in the operation of one medium in a community, coupled with an investment in another media outlet in the same area, might in some instances result in the egregious diminution of the arm's-length competition and the diversity of viewpoints that our cross-interest policy seeks to foster. *United Community Enterprises, Inc.*, 37 F.C.C. 2d 953 (Rev. Bd., 1972); *Cleveland Television Corp.*, 91 F.C.C. 2d 1148 (Rev. Bd. 1982), *rev. denied*, FCC 83-235 (released May 18, 1983), *affirmed sub nom., Cleveland Television Corp. v. F.C.C.*, 732 F. 2d 962 (D.C. Cir. 1984).

Attention has generally focused on broadcast stations in the same service (*e.g., K & M Broadcasters, Inc.*, 19 F.C.C. 2d 947 (Rev. Bd. 1969), but cross-interest questions have been explored where different services in the same geographical area are involved (*e.g., Lexington County Broadcasters, Inc.*, 42 F.C.C. 2d 581 (Rev. Bd. 1973)). Although what is meant by the "same geographical area" has not been precisely defined, we have generally referred to stations "in substantially the same market" or in "substantially the same area." *See, e.g., Farmville Broadcasting Co.*, 47 F.C.C. 2d 463, 464 (1974); *Guy S. Erway*, 90 F.C.C. 2d 750, 752 (Rev. Bd. 1980). Moreover, while we are here

called upon to consider a television-newspaper cross-interest question under the policy, the public interest considerations underlying our past applications of the cross-interest policy involving other media combinations would appear to be applicable here.

As a general matter, we would not raise cross-interest concerns where the interests held in two media in the same area are both nonattributable. Where, however, one interest is attributable and the other is not, our review focuses on the nature and extent of the interests involved to determine whether a significant diminution of competition or diversity of viewpoints is likely. In this case, the Journal is restricted from taking an active role in the management and operation of the station, but because it has a subscribed equity interest in the station and can exercise control of the newspaper, it is possible that it could adjust its newspaper's business practices to protect its investment in the station. Nevertheless, we believe that, under the particular circumstances of this case, grant of your application is warranted. Our decision rests, in large part, upon the fact that, while the proposed television station will serve both Marshfield and Stevens Point, the *Stevens Point Daily Journal* will not do likewise. In fact, the circulation of each community's daily newspaper in the other is negligible (less than one percent), and neither newspaper regularly covers news of the other. Similarly, you state that the station's coverage of local news in Stevens Point will be limited only to the most "extraordinary and significant of events" and that you will maintain neither staff nor facilities there. Such disparate coverage is indicative of the fact that Marshfield and Stevens Point are not part of a large megalopolis but, rather, are two small, discrete communities separated by more than 30 miles. We also note that your currently authorized facilities would place a predicted Grade A signal over much of Stevens Point.

For the reasons stated above, we believe that grant of your application is in the public interest. Not only does each community have its own daily newspaper, but each already receives at least three commercial television and 17 commercial radio signals. In addition, there is approximately 77 percent cable penetration in Stevens Point. Accordingly, we do not find the elements present here that would normally cause us to invoke our cross-interest policy. We believe it important to note that if, for example, the newspaper and television station were located in the same community, a different conclusion might be warranted. That is

not the case here, and because we find you qualified to construct and operate as proposed, your application IS GRANTED.

BY DIRECTION OF THE COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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